(16,395.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 242.

ADELIA YOUNG, CADENIA C. YOUNG, AND DELECTA MASTON, APPELLANTS,

vs.

JENNIE AMY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH

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1 In the Supreme Court of Utah Territory.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

Statement of Facts in the Case.

This cause came up in the district court of the third judicial district of Utah Territory on an appeal from the probate court of Summit county, Utah Territory, from an order and decree of distribution of the estate of Oscar A. Amy, deceased, which consists of the property hereinafter described.

There were three classes of claimants for the property of the said Oscar A. Amy, deceased, claiming adversely each to the other.

First. Adelia Young, Cedenia C. Young, and Delecta Maston, the maternal aunts of Oscar A. Amy, represented by Le Grand Young, Esq.

Second. Jennie Amy, claiming to be the wife of Oscar A. Amy, represented by S. P. Armstrong and W. H. Dickson, Esqrs.

Third. Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark, the half brother and sisters of Oscar A. Amy, represented by Messrs. Pence & Allen.

The cause having been regularly called was tried in said district court before Hon. S. A. Merritt, presiding judge, on the 8th day of January, 1895, S. P. Armstrong and W. H. Dickson appearing as counsel for Jennie Amy, Pence & Allen appearing for Royal D. Amy *et al.*, and Le Grand Young appearing for Adelia Young *et al.*

2 In the Supreme Court of Utah Territory.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

Statement of Facts.

Findings of facts and conclusions of law made and entered by the supreme court of Utah Territory in the above-entitled action December 21, 1895, and adopted by the supreme court of the State of Utah September 21, 1896.

This cause coming on regularly to be heard, Adelia Young, Cedenia C. Young, and Delecta Maston appearing by their counsel, Le Grand Young, Esq., and Jennie Amy appearing by her attorneys, S. P. Armstrong, Esq., and W. H. Dickson, Esq., and the testimony having been examined, the case having been submitted, the court finds the following facts therefrom, to wit:

First. That said Oscar A. Amy died intestate in the county of Summit, Utah Territory, on the 26 day of May, 1891.

Second. That his estate was duly probated in the probate court of Summit county, Utah, and a decree of distribution was therein entered in favor of respondents herein, namely, Adelia Young, Cedenia C. Young, and Delecta Maston. From said order and decree Jennie Amy and also Royal D. Amy, Francis L. Jackson, Ellen

R. Smith, Mary A. Haynes, and Sabia A. Clark appealed to the district court of the third judicial district of the Territory of Utah, wherein said matter was tried *de novo*, resulting in a decree in favor of the said respondents, Adelia Young, Cedenia C. Young, and Delecta Maston. The said Jennie Amy and also Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark moved for a new trial, alleging certain errors of the court; which motion was denied; from which judgement and the order denying a new trial the said Jennie Amy *et al.* appealed to the supreme court of Utah Territory, where the cause was argued in the June term, 1895, and on December 21, 1895, the supreme court of Utah Territory reversed the order and decree of the district court and entered a judgement in favor of said Jennie Amy and
3 against the said Adelia Young, Cedenia C. Young, and Delecta Maston *et al.*, from which said judgement and decree the said Adelia Young, Cedenia C. Young, and Delecta Maston then and there gave notice of appeal to the Supreme Court of the United States from said judgement and decree made and entered by the supreme court of Utah Territory.

Third. The court finds that Lavira C. Smith, the mother of Oscar A. Amy, was the exclusive owner and occupant from about the year 1864 down to the time of her death, which occurred in 1883, January 1, of the following-described premises and property, to wit, part of lots one and two, in block seventy, plat "A," Salt Lake City survey, and bounded as follows: Commencing at a point nine and one-half feet south from the northeast corner of said lot one, thence south three rods; thence west eleven rods; thence north three rods; thence east eleven rods to the place of beginning, containing thirty-three square rods of ground, situated in Salt Lake City, county of Salt Lake, Utah Territory, of the value of $25,000.

Fourth. That on or about the year 1870 the mayor of Salt Lake City entered the land lying within the limits of Salt Lake City, within which was the foregoing-described premises and property, pursuant to act of Congress, in trust for the use and benefit of the occupants thereof.

Fifth. That the said Lavira C. Smith in her own right and as such occupant filed upon said premises and property, which was adjudicated to her in the probate court, pursuant to an act of the legislature of Utah Territory, and therefore the mayor of Salt Lake City issued to her a deed in fee-simple.

Sixth. That afterwards, on the 1st day of January, 1883, said Lavira C. Smith died intestate in Salt Lake county, Utah Territory, leaving surviving her two children, the eldest a daughter, then aged about thirty-five years, named Lavira A. Smith, by her first husband, then long since deceased; a second child, aged
4 about twenty-five years, named Oscar A. Amy, being the child of a second husband, who was long prior thereto deceased.

Seventh. That the estate of Lavira C. Smith was duly administered, and the property divided between her said two children.

Eighth. That afterwards, to wit, on the 18 day of December, 1888, the said Lavira A. Smith, daughter of said Lavira C. Smith, and half-sister of said Oscar A. Amy, deceased, died intestate, leaving no father or mother, husband or children, and no brothers or sisters of the whole blood or of the blood of the ancestor through whom the property came to her, excepting her said half-brother, Oscar A. Amy, whom she left surviving her as her sole heir.

Nineth. That Royal D. Amy *et al.* are not blood relations of either ancestor from whom the property came to Oscar A. Amy, the decedent.

Tenth. That the said Oscar A. Amy died intestate in Summit county, Utah Territory, as aforesaid, on the 26 day of May, 1891, leaving no issue, no father, no mother, no brothers or sisters of the whole blood or of the blood of the ancestors through whom the property came to him, and no uncles, but leaving surviving him his said three maternal aunts, the sisters of his said mother, namely, Adelia Young, Cedenia C. Young, and Delecta Maston, and the said Jennie Amy, appellant herein, whom this court now finds to be his surviving widow.

Eleventh. The court further finds that the said Jennie Amy was married to one Elliot Butterworth in 1875.

That on the third day of September, 1879, the probate court of Washington county made and entered a decree of divorce, dissolving the bonds of matrimony theretofore existing between the said Jennie Amy and the said Elliot Butterworth, and absolutely releasing the said Jennie Amy and the said Elliot Butterworth from all the obligations of said marriage; that the said probate court so granting said decree of divorce was a court of competent jurisdiction and had jurisdiction of the subject-matter of said divorce action and of both the parties thereto.

That the said defendant therein, Elliot Butterworth, had knowledge at the time of the said divorce proceedings and was duly served with process in said action.

That the said Elliott Butterworth married a second wife on the 11th day of October, 1880, being the year after said decree of divorce was rendered; that his second wife is still living, and she and the said Elliot Butterworth are still husband and wife; that as the issue of said second marriage the said Elliot Butterworth and his present wife have seven children, ranging from two years to fifteen years old.

That afterwards, to wit, on April 4, 1886, the said Jennie Amy, the claimant in this proceeding to the estate of the said Oscar A. Amy, deceased, was duly and lawfully married to the said Oscar A. Amy, and continued to be and was his lawful wife at the time of his death.

That the said Jennie Amy is now the widow of said Oscar A. Amy, deceased, and as such widow she is the successor to the whole of his estate, consisting of the property hereinabove described.

The foregoing is a statement of the facts found upon the evidence in the case, and the following are the rulings of the court on the admission and the rejection of the evidence, which was duly ex-

cepted to by counsel for Adelia Young, Cedenia C. Young, and Delecta Maston:

6 Mrs. JENNIE AMY, called and sworn in her own behalf, testified as follows:

Direct examination;

My name is Mrs. Jennie Amy. I was acquainted with Oscar A. Amy, decedent, in his lifetime. I was married to Oscar A. Amy at Salt Lake City, Utah, by Judge Zane, on the fourth day of April, 1886. I received a certificate of marriage, which I gave to my attorney. It was used in the trial in the probate court, but I have been unable to find it since. I lived with Oscar A. Amy as his wife, and had two children by him; both are dead. One lived about seven months. Both died before the death of Oscar A. Amy. I was not very well acquainted with Oscar A. Amy's relatives. I was acquainted with Lavira A. Smith, a half-sister of Oscar A. Amy. She had no children living at the time of her death. She had no brothers or sisters except Oscar A. Amy, who was a half-brother. I had been married prior to my marriage to Oscar A. Amy to one Elliot Butterworth. I married Elliot Butterworth in 1875, and was about sixteen years of age at that time.

Divorce proceedings were instituted by me to obtain a divorce from said Elliot Butterworth.

Thereupon the following proceedings took place:

Mr. ARMSTRONG: I offer the complaint in the case of Jane Butterworth *vs.* Elliot Butterworth; you are familiar with it.

LE GRAND YOUNG: We object to his offering it, the record, by piecemeal.

COURT: Offer the complaint and the proceedings.

Mr. DICKSON: We offer the complaint and will show service of the summons under the complaint, and then offer the decree. If the complaint states a cause of action and one that gave the
7 court jurisdiction of the subject-matter, and the defendant was served with summons and the decree regularly entered, that is all the record we are required to offer.

Mr. PENCE: They should offer the judgement-roll. Whatever there is should be offered. There is a certified copy of the proceedings in that case.

The COURT: Offer all the proceedings in the case.

Mr. DICKSON: The only papers there are is the complaint and decree. The summons is lost. The only thing there would be for a judgement-roll in the probate court would be the complaint, summons, and decree. That is all. The only findings there are are those here in the decree itself.

Mr. PENCE: There may have been some defective service of summons. We take it the whole record should go in.

Mr. DICKSON: We will offer what we claim to be the roll.

Mr. PENCE: We have a certified copy of the proceedings.

Mr. DICKSON: That judgement-roll contains many things which is

by no means part of the judgement-roll. The summons is lost, but we can prove the service of summons, and the decree recites the service.

LE GRAND YOUNG: We do not care about the complaint, for that would be nothing without the decree, and the complaint nothing without the service of summons, but we object that it is irrelevant and immaterial.

Mr. DICKSON: The decree is as conclusive as it is in the district court.

The COURT: The probate court having jurisdiction of divorce, the statute govern- the practice, just as it governs the practice in the district court.

Mr. DICKSON: We are prepared to show by the defendant himself that he was served with the summons in that case, if there is any question about it, the decree itself having found it as a fact.

The COURT: It goes in to be argued.

8 LE GRAND YOUNG: Your honor does not accept the evidence yet.

COURT: You can argue that finally. It is not determined now.

Mr. ARMSTRONG: I offer, then, the complaint in the case of Jane Butterworth *vs.* Elliott Butterworth filed in the probate court of Washington county, Utah Territory, on the 16 day of July, 1879, and wish it marked by the reporter.

Marked "Jennie Amy's Exhibit A."

Mr. ARMSTRONG: We also offer the decree in the same case in the same court.

COURT: I receive it subject to the objection.

Marked "Jennie Amy's Exhibit B."

Q. Did your attorney see you in regard to the matter of this divorce?

A. Yes, sir.

Q. You were the plaintiff in that action and signed the complaint at that time?

A. Yes, sir.

Q. And about that time or soon after that time did you see him have any other papers?

Objected to as immaterial.

Mr. DICKSON: Did you ever see the summons in the case?

A. Yes, sir.

Objected to as immaterial.

Mr. DICKSON: There was no summons on file. We will show one was issued.

Mr. PENCE: We object to that. That is not the proper way of proving the issuance of summons. The clerk ought to be called to show the issuance of summons.

COURT: I think you ought to have the clerk here.

Mr. DICKSON: If his record is silent upon it, he would be no more competent to prove it than anybody else who had knowledge of the fact.

Mr. YOUNG: The clerk certifies that there never were any more papers than there are now.

9 COURT: I will take the evidence subject to the objection and you can argue it later in the case.

Mr. YOUNG: It is not admitted.

Mr. DICKSON: It is received subject to the objection. Let it be received, and if it is not relevant strike it out.

COURT: I will receive the evidence subject to the objection.

Mr. YOUNG: The court to decide if the evidence is relevant or irrelevant finally.

Mr. DICKSON: Yes, sir.

Mr. PENCE: This is incompetent as to whether she saw a summons or order of publication. There is a clerk here of that court, and, as we have had some three years to take depositions of witnesses in this case, we think if there was an order of publication the clerk should have been called to prove it.

Mr. DICKSON: If there was an order of publication made and the clerk did not minute it, that would not affect the jurisdiction of the court at all.

COURT: Go ahead. I will decide the relevancy of the testimony when I come to it.

Q. I show you a copy of the Silver Reef Miner, dated Wednesday, July 30, 1879, and ask you if that paper has been in your possession since that date.

A. Yes, sir.

Mr. DICKSON: This paper contains what purports to be a copy of the summons; as tending to prove there was a summons we offer it.

Mr. PENCE: We object to it as incompetent. The method of proof provided by the statute is by affidavit of the publisher.

Marked "Jennie Amy's Exhibit C."

Elliott Butterworth.

Mr. ELLIOTT BUTTERWORTH, a witness sworn on behalf of Jennie Amy, testifies as follows:

Direct examination.

10 Direct examination of ELLIOT BUTTERWORTH:

Q. What is your full name?

A. Elliot Butterworth.

Q. You are acquainted with the lady who was last on the stand?

A. Yes, sir.

Q. You were at one time married to her?

A. Yes, sir.

Q. Did the fact of her having instituted divorce proceedings against you in the probate court of Washington county, in this Territory, come to your knowledge?

A. Yes, sir.

Mr. YOUNG: We object.
COURT: Stand by the record.
Mr. DICKSON: We wish to prove the receipt of the summons by the defendant.

Q. Where were you living at the time?
A. Franklin, Idaho.
Q. Were you living in Franklin, Idaho, September, 1879?
A. Yes.
Q. Were you living there in July, 1879?
A. Yes, sir.
Q. 14th or 15th of July, 1879?
A. Yes, sir.
Q. Continuously for some time before and after those dates?
A. Yes, sir.
Q. Did you between those dates at any time, 14th day of July, 1879, and the 3rd day of September, 1879, receive a summons issued out of that court in the case of Jane Butterworth against Elliot Butterworth?

Objected to as a conclusion of law and not as the proper way of proving the service of summons.

Admitted subject to the objection.

11 Mr. PENCE: We object to it as immaterial and irrelevant.

A. Yes, sir; I received a letter from the court of Washington county.
Q. State that letter.
A. I received a letter or a summons, whatever you would call it, from the court at Washington county.
Mr. YOUNG: Where is that document?
A. I have not found it; I mislaid it at that time.

Mr. YOUNG: I object to it as utterly immaterial and improper.
Mr. PENCE: We object to such matters going in. If they go in, they are a sort of proof; if they are clearly incompetent, they ought not to be considered.

Q. Did that paper—whatever it was—did it have the name of the court on it?
A. Yes, sir.
Q. Do you remember?
A. As near as I can tell, it was like the publication in the paper.
Q. Did you receive a paper, a copy of the Silver Reef Miner, at the same time?
A. Yes, sir; I received quite a number of them.
Q. Did those papers you received contain a copy of the paper you received from the court?
A. Yes, sir.
Q. I call your attention to the Silver Reef Miner, July 30, 1879, and call your attention to an item published therein, notice No. 41, entitled Summons; in the probate court in and for Washington county, Territory of Utah; Jane Butterworth, plaintiff, *vs.* Elliott Butterworth, defendant; greeting, &c. Did you receive a paper—a

copy of the Silver Reef Miner—about the dates you speak of containing this publication?

A. Yes, sir.

Q. Now, state whether or not this paper which you say you received from the court was a copy of this matter published here.

12 A. As near as I can remember, it was.

Q. You read both at the time?

A. Yes, sir.

Q. What you received in the form of a letter, as you call it, and what you read in the paper?

A. Yes, sir.

Q. How many copies did you receive of that publication?

A. I could not tell exactly how many copies I received, but I cut out six of these copies, five of which I gave to Mr. Armstrong.

Q. You have had them ever since?

A. Yes, sir.

Q. So you received those papers—six of these papers, at least—containing this notice?

A. Not less than six; whether there was any more than that I don't remember exactly.

Q. I hand you five slips and ask whether these are the slips you cut out of the paper.

A. It was.

Mr. DICKSON: I offer these, each being a copy of the summons as published.

Received in evidence subject to objection, marked Exhibits "D," "E," "F," "G," and "H."

Q. Were the papers containing these summons, copies of the Silver Reef Miner, sent to you postage prepaid or were you a subscriber to the paper?

A. I was not a subscriber. They were sent postage prepaid.

Q. I will ask you if since the third day of September, 1879, you have married again.

A. Yes, sir.

13 Objected to as irrelevant. Received subject to objection.

Q. When were you married?

A. 1880—the 11 day of October, 1880.

Q. The following year?

A. Yes, sir.

Q. Then the wife you then took is still living?

A. Yes, sir.

Q. You and she are still husband and wife?

A. Yes, sir.

Q. Any children by the marriage?

A. Seven children.

Q. What are their ages?

A. The oldest one is 13 past and the youngest pretty near two years.

Cross-examination of ELLIOT BUTTERWORTH by Mr. PENCE:

Q. How long after your first marriage—after the divorce was granted—did you marry?

A. How long afterwards?

Q. Yes, sir.

A. It was in July or August, 1879, when I received the papers and the letter or summons, and we were married in 1880.

Q. At that time, Mr. Butterworth, you were a member of the Mormon Church, were you not?

A. Yes, sir.

Q. I will ask you, Mr. Butterworth, whether at that time, as a part of your religious belief, you did not consider it proper to marry a second time.

Objected to as immaterial.

A. No, sir.

Q. How long did you continue a member of the Mormon Church?

A. I am a member yet.

Q. Have you been a member all the time?

A. Been a member ever since.

Q. When did you cut out these slips of paper as handed in here?

A. I cut them out as the paper came to me.

Q. Why did you cut them out?

A. To preserve them.

Q. Why didn't you keep the papers themselves?

A. I do not know, I am sure. That is a question I cannot answer.

Q. How many of those papers did you receive?

A. Well, I cut six out, but I lost one with the letter. I
14 know I cut six out, for I saw them afterwards—after I cut them out.

Q. You were a witness in the trial of this case before in the probate court?

A. No. sir.

Q. Were you not a witness in the trial of the case of Jennie Amy against Oscar Amy?

A. I gave a deposition once in Salt Lake City here before——

Q. Mr. Lewis?

A. I don't know. Mr. Hall sent for me.

Q. That was in 1890, was it not?

A. I don't remember the date.

Q. Were you not interested at that time, Mr. Butterworth, in having this divorce obtained in Washington held to be valid?

A. Interested?

Q. Yes, sir.

A. Yes, sir.

Q. Quite anxious that the divorce should be declared valid?

A. Yes, sir; just as anxious as I am today.

Q. You were as familiar with the matter of this summons being sent to you then as you are now?

A. Yes, sir.

Q. This all happened in 1879 or 1880, long prior to taking of your deposition, didn't it?

A. I don't remember the date I came down here.

Q. It was three or four years ago?

A. Yes, sir; I guess it is.

Q. Why didn't you at that time call attention to the fact that such papers had been sent to you?

A. I was not asked at all.

Q. You were interested in the case to have the divorce declared legal?

A. I just simply sat like I am today, answering the questions asked of me.

Q. You say you were very desirous that the divorce should be declared legal and were anxious to do what you could to have the divorce declared valid, were you not?

A. Yes, sir; I think the divorce was legal.

Q. Why didn't you call attention, then, at the time the deposition was taken in the case in which the question of the validity of the marriage was involved that such papers had been sent to you?

A. I could not tell you why it was I didn't do it.

Q. Isn't it a fact——

15 A. It was the same day I gave Mr. Armstrong the papers.

Q. Isn't it a fact you never saw these slips of paper until within the last two years?

A. No, sir; that is not a fact.

Q. Isn't it a fact you received the papers from the claimant in this case, Jennie Amy?

A. I don't know who the papers came from. I received them by mail.

Q. Isn't it a fact you received them within the past two years from Jennie Amy and you never saw them before that time?

A. No, sir; I received these papers as they were published and took them through the month of July and August; along through there. I received the papers myself; cut them out.

Q. Can you remember the contents of that letter you say you received from somebody there?

A. As near as I can tell, it was like the summons.

Q. You may state what it contained.

A. It contained a summons.

Q. State the wording of it.

A. Oh, I could not do that. I can read it to you if that will do. I have not learned it off by heart.

Q. Can you state any part of it, the date of it?

A. Well, it was in July.

Q. The name of the clerk?

A. No; I have not studied it.

Q. Never paid much attention to it?

A. Have not paid much attention to it. I supposed it was all done in legal and lawful form and I let it go.

Q. When did you hand these papers to Mr. Armstrong?

A. I handed them to him the day I came down here before Mr. Hall.

Q. When did you say you handed them — him; the day before you came down to Hall?

A. No; the day I was here, the day I was with Hall and gave the deposition.

Q. You handed them to Armstrong at that time?

A. Yes, sir.

Q. That was in 1890?

A. I don't remember the date.

16 Q. You gave a deposition only once, did you?

A. That is all.

Q. You are quite positive of the date you handed those papers to Mr. Armstrong; that it was the same day you gave your deposition in the other case?

A. Yes, sir.

Redirect examination of Mr. BUTTERWORTH by Mr. DICKSON:

Q. Do you remember whether it was before or after you gave your deposition that you handed the paper clippings to Mr. Armstrong?

A. It was afterwards.

Q. But the same day?

A. The same day.

Mr. DICKSON: I call the attention of the court to the fact he was called by Hall, the attorney of Oscar Amy, to prove the former marriage. That was all.

It is admitted that Jennie Amy's Exhibits D, E, F, G, and H are slips, which appear to have been clipped from a newspaper; that on one side of each of said slips is printed the summons in said divorce case, being an exact duplicate copy of the summons set out in "Jennie Amy's Exhibit C" to this statement attached; that the printed matter on the reverse or opposite side of said slips is different on each slip, and also different from that on the reverse side of the copy contained in the paper which was introduced and marked "Exhibit C"—that is, while all six of the notices are the same on the side on which the summons is printed, yet no two of said notices have the same printed matter on the reverse side thereof.

It is further admitted that the notice described in section two of the act prescribing rules and regulations for the execution of the trust arising under the act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, passed by the territorial legislature and approved February 17, 1869, was duly given according to law.

Thereupon Jennie Amy rested.

17 JENNIE AMY'S EXHIBIT A.

In the Probate Court of Washington County, Territory of Utah.

JANE BUTTERWORTH (*née* WRIGHT)
against
ELLIOT BUTTERWORTH.

The above-named plaintiff alleges and complains:

First. That the plaintiff and defendant intermarried at Virgin City, in the county of Kane, Territory of Utah, on or about the 28 day of March, A. D. 1875, and ever since have been and now are husband and wife.

Second. That the plaintiff is and has been a resident in the Territory of Utah for the period of more than one year last and is now such resident.

Third. That on or about the month of May, in the year 1876, the said defendant, disregarding the solemnity of his marriage vow, wilfully and without cause deserted and abandoned the plaintiff and neglected to support and maintain said plaintiff during the time last aforesaid and now still continues to wilfully and without cause desert and abandon said plaintiff and to live separate and apart from her without any sufficient cause or any reason and against her will and without her procurement or consent.

Wherefore the plaintiff prays for a decree of divorce, that the bonds of matrimony between herself and defendant be dissolved and she be forever freed and she be allowed to assume her surname, and for other proper relief.

JANE BUTTERWORTH,
Plaintiff in Person.

TERRITORY OF UTAH, } ss:
County of Washington, }

Jane Butterworth, being duly sworn, says she is the above-named plaintiff; that she has heard read the foregoing complaint and knows the contents thereof, and the same is true of her own knowledge, except those parts stated upon information and belief, and as to those parts she believes it to be true.

JANE BUTTERWORTH.

Subscribed and sworn to before me this 14 day of July, A. D. 1879.

JOS. T. WILKINSON,
J. P., Leeds Precinct.

S. C. PERRIN,
Attorney for Plaintiff.

18 TERRITORY OF UTAH, } ss:
County of Washington, }

I, Seth A. Pymm, clerk of the probate court of said county, do hereby certify the foregoing to be — true, full, and correct copy of

the complaint on file in my office in the case of Butterworth *vs.* Butterworth.

As witness my hand and seal this 17 day of June, A. D. 1890.

[SEAL.] SETH A. PYMM,
Probate Clerk.

(Endorsed:) 157. In probate court, Washington county, Territory of Utah. Jane Butterworth, *née* Wright, ag't Elliot Butterworth. Comp't divorce. S. C. Perrin, att'y for pl'ff. Filed 16 day of July, A. D. 1879. A. R. Whitehead, probate clerk, per Seth A. Pymm, deputy.

19 JENNIE AMY'S EXHIBIT "B."

In the Probate Court in and for the County of Washington, Territory of Utah.

Present: Hon. John M. Macfarlane, probate judge.

JANE BUTTERWORTH, Plaintiff,
vs.
ELLIOT BUTTERWORTH, Defendant. } Decree of Divorce.

This cause having been brought on to be heard this third day of September, A. D. 1879, upon the complaint herein taken as confessed by the defendant (whose default for not answering has been duly entered), upon the proofs taken herein, from which it appears that all the material allegations of the complaint are sustained by testimony, free from all legal exceptions as to its competency, admissability, and sufficiency, that said plaintiff was a resident of this Washington county, and it also appearing to said court that said defendant was duly served with process by publication, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered:

Wherefore it is here ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested and in pursuance of the statute in such case made and provided, does order, adjudge, and decree, that the marriage between said plaintiff, Jane Butterworth, and the said defendant, Elliot Butterworth, be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof.

Done in open court the 3d day of September, 1879.

JOHN M. MACFARLANE,
Judge of said Probate Court.

20 TERRITORY OF UTAH, } ss:
County of Washington, }

I, Seth A. Pymm, clerk of the probate court of said county, hereby certify the foregoing to be a true, full, and correct copy of

decree of divorce in the case of Butterworth *vs.* Butterworth, as shown on the records of the probate court of said county.

Witness my hand and seal this 23 day of June, A. D. 1891.

SETH A. PYMM,
Probate Clerk.

21 JENNIE AMY'S EXHIBIT "C."

Jennie Amy's Exhibit "C" consists of a copy of the "Silver Reef Miner," a semi-weekly newspaper, published Wednesdays and Saturdays at Silver Reef, Washington county, Utah, dated the 30 July, 1879, in which newspaper is contained a publication of summons as follows:

Summons.

In the Probate Court in and for Washington County, Territory of Utah.

JANE BUTTERWORTH, Plaintiff,
vs.
ELLIOT BUTTERWORTH, Defendant.

The People of the Territory of Utah to Elliot Butterworth, Greeting:

You are hereby summoned to appear in an action brought against you by the above-named Jane Butterworth, plaintiff, in the probate court in and for the county of Washington and Territory of Utah, and answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons if served within this county, and if served out of this county, but within the district, within twenty days, otherwise within forty days, or judgement by default will be taken against you according to the prayer of said complaint and the proofs to be adduced therein.

This action is brought to obtain a decree dissolving the bonds of matrimony existing between said plaintiff and defendant on the grounds set forth in the complaint on file in my office, and if you fail to appear and answer the said complaint, as required, plaintiff will take default against you and apply to the court for the relief prayed for.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 16 day of July, A. D. 1879.

[SEAL.] A. R. WHITEHEAD,
Clerk of Probate Court.
SETH A. PYMM, *Deputy.*

Jy-19-46-law.

Jennie Amy's Exhibits D, E, F, G, and H are clippings from different issues of said Silver Reef Miner containing the publication of summons identical with the summons as shown by the said Jennie Amy's Exhibit "C."

22 Pence & Allen, on behalf of Royal D. Amy *et al.*, offered in evidence the certified copy of the record of the probate

court of Washington county in the matter of the action of Butterworth *v.* Butterworth, a copy of which is hereto attached and marked "Royal D. Amy's Exhibit 4."

Mr. Dickson, on behalf of Jennie Amy, objected to the introduction of that part of the document offered consisting of the affidavit of S. C. Perrin, filed in the probate court July 16, 1879, and the affidavit of Edward Pike, filed in the probate court September 2, 1879, on the ground that they are not part of the judgement-roll and are incompetent, irrelevant, and immaterial; also that part immediately following the said affidavit of said Pike, entitled as follows:

"In the probate court in and for the county of Washington, Territory of Utah, September 3, 1879. Present: McFarland, judge, and A. R. Whitehead, clerk. Jane Butterworth *v.* Elliot Butterworth. In divorce.

"This cause having been brought on to be heard," etc., down to the title of the court and cause again entitling the decree of divorce in said action, on the ground that the same is only the minutes of the court and not part of the judgement-roll, and incompetent, immaterial, and irrelevant.

Mr. Young objected to the whole pretended record on the ground that the same is incompetent, immaterial, and irrelevant.

The said record was received, subject to the final rulings of the court.

23 ROYAL D. AMY'S EXHIBIT 4.

In the Probate Court of Washington County, Territory of Utah.

JANE BUTTERWORTH (*née* WRIGHT)
against
ELLIOT BUTTERWORTH.

The above-named plaintiff alleges and complains:

First. That the plaintiff and defendant intermarried at Virgin City, in the county of Kane, Territory of Utah, on or about the 28 day of March, A. D. 1875, and ever since have been and now are husband and wife.

Second. That the plaintiff is and has been a resident in the Territory of Utah for the period of more than one year last and is now such resident.

Third. That on or about the month of May, in the year 1876, the said defendant, disregarding the solemnity of his marriage vow, wilfully and without cause deserted and abandoned the plaintiff and neglected to support and maintain said plaintiff during the time last aforesaid and now still continues to wilfully and without cause desert and abandon said plaintiff and to live separate and apart from her without any sufficient cause or any reason and against her will and without her procurement or consent.

Wherefore the plaintiff prays for a decree of divorce, that the bonds of matrimony between herself and defendant be dissolved

and she be forever freed, and she be allowed to assume her surname, and for other proper relief.

JANE BUTTERWORTH,
Plaintiff in Person.

TERRITORY OF UTAH, }
County of Washington, } ss:

Jane Butterworth, being duly sworn, says she is the above-named plaintiff; that she has heard read the foregoing complaint and knows the contents thereof, and the same is true of her own knowledge, except those parts stated upon information and belief, and as to those parts she believes it to be true.

JANE BUTTERWORTH.

Subscribed and sworn to before me this 14 day of July, A. D. 1879.

JOS. T. WILKINSON,
J. P., Leeds Precinct.

S. C. PERRIN,
Attorney for Plaintiff.

24 (Endorsed:) 157. In probate court, Washington county, Territory of Utah. Jane Butterworth, *née* Wright, ag't Elliot Butterworth. Comp't divorce. S. C. Perrin, att'y for pl'ff. Filed 16 day of July, A. D. 1879. A. R. Whitehead, probate clerk, per Seth A. Pymm, deputy.

25 In the Probate Court, Washington County, Territory of Utah—John M. Macfarlane, P. J.

JANE BUTTERWORTH }
vs.
ELLIOT BUTTERWORTH. }

Plaintiff, Jane Butterworth, by her attorney, S. C. Perrin, being duly sworn, says that the def'd't in the above-entitle- action is a non-resident of this Territory, and that when last heard from his residence was in Franklin, Oneida county, Idaho Territory; that service of summons in the above-entitled action cannot be made, and prays the court that such service be made by publication in a newspaper in this county, as by law provided.

S. C. PERRIN, *Att'y.*

Subscribed and sworn to before me this 16 day of July, A. D. 1879.

JOHN M. MACFARLANE,
Probate Judge.

Filed the 16 day of July, A. D. 1879.

A. R. WHITEHEAD,
Probate Clerk,
Per SETH A. PYMM, *Dep.*

TERRITORY OF UTAH, } ss:
Washington County, }

In the Probate Court, Washington County—John M. Macfarlane, P. J.

JANE BUTTERWORTH, Plaintiff, }
vs.
ELLIOT BUTTERWORTH, Defendant. }

Edward Pike, being first duly sworn, upon his oath says that he is the editor and proprietor of a certain paper published in the above-named county and Territory called the Silver Reef Miner, and that he has within the last forty days forwarded to the defendant four different copies of the above-named paper at four several times containing summons in the above-entitled action, and that said summons was a copy of the same issued by the clerk of the probate court of Washington county, Territory of Utah, and that the same was addressed to the defendant in the above-entitled action at Franklin, Idaho Territory.

EDWARD PIKE.

26 Subscribed and sworn to before me this second day of September, A. D. 1879.

FRANK X. LOUGHERY,
Notary Public.

(Endorsed:) Affidavit. Butterworth *vs.* Butterworth. Divorce. Filed September 3d, 1879. A. R. Whitehead, probate clerk.

In the Probate Court in and for the County of Washington, Territory of Utah, September 3d, 1879.

Present: Hon. John M. Macfarlane, judge, and A. R. Whitehead, clerk.

JANE BUTTERWORTH }
vs. } In Divorce.
ELLIOT BUTTERWORTH. }

This cause having been brought to be heard this third day of September, A. D. 1879, on the complaint filed July 16, 1879—

Affidavit of Edward Pike, editor of the Silver Reef Miner, presented as proof of publication of summons filed, stating therein that four different copies had been forwarded to the defendant in the above-entitled action, and his default having been entered up, the court proceeded to hear the evidence for the plaintiff.

Plaintiff appeared in person and by her attorney, S. C. Perrin.

Mr. LUMAN WRIGHT and JANE BUTTERWORTH sworn:

Jane Butterworth says she has not lived with defendant as his wife for 3 years; says he has never done anything to support her; he left without her consent; witness has considered this county as

her residence for over one year; that she has applied for this divorce to be able to support herself.

Luman Wright says he has been acquainted with plaintiff and defendant for nearly four years since their marriage; never knew defendant to furnish anything for the support of the plaintiff; knows the plaintiff to have been a resident of Leeds, in this county, for over one year.

Counsel for plaintiff moved for a decree of divorce. The court, having duly considered its judgement to be rendered herein, ordered that a decree of divorce be entered as follows, to wit:

27 In the Probate Court in and for the County of Washington, Territory of Utah.

Present: Hon. John M. Macfarlane, probate judge.

JANE BUTTERWORTH, Plaintiff,
vs.
ELLIOT BUTTERWORTH, Defendant. } Decree of Divorce.

This cause having been brought on to be heard this third day of September, A. D. 1879, upon the complaint herein taken as confessed by the defendant (whose default for not answering has been duly entered) upon the proofs taken herein, from which it appears that all the material allegations of the complaint are sustained by testimony, free from all legal exceptions as to its competency, admissability, and sufficiency; that said plaintiff was a resident of this Washington county, and it also appearing to said court that said defendant was duly served with process by publication and all and singular the law and premises being by the court here seen, heard, understood, and fully considered:

Wherefore it is here ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested and in pursuance of the statute in such case made and provided, does order, adjudge, and decree, that the marriage between said plaintiff, Jane Butterworth, and the said defendant, Elliot Butterworth, be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof.

Done in open court the 3d day of September, 1879.

JOHN M. MACFARLANE,
Judge of said Probate Court.

28 *Washington County Probate Court Docket.*

No. of suit.	Name- of parties.	Title of suit.	Attorney for pl't'ff.
157	Jane Butterworth *vs.* Elliot Butterworth.	Divorce.....	S. C. Perrin.

Att'y for def'd't.	Time of trial.	Process.	Return.	Judgement.
	Sept. 3, 1879	July 16, 1879, summons sent for publication. S. R. Miner.	Default..	Rendered for plaintiff Sept. 3, 1879.

29 TERRITORY OF UTAH, } *ss:*
County of Washington, }

I, Seth A. Pymm, clerk of the probate court of said county, do hereby certify that the foregoing copies of complaint, affidavit of non-residence, affidavit of publication, minutes of court, decree of divorce, and docket are full, true, and correct copies of the original papers on file of the record, and also of the docket entry in said cause, and that said copies constitute the whole record in said cause. I further certify that I was deputy clerk at the time said cause was pending, and that the foregoing are all the papers which are filed in said cause.

Witness my hand and official seal this 28th day of August, A. D. 1891.

[SEAL.] SETH A. PYMM,
Probate Clerk.

TERRITORY OF UTAH, }
County of Washington, }

I, Francis L. Daggett, judge of the probate court of said Washington county, do certify that Seth A. Pymm is the duly qualified and acting clerk of said court.

Witness my hand and the seal of said court this 28th day of August, A. D. 1891.

[SEAL.] FRANCIS L. DAGGETT,
Probate Judge.

30 It is hereby stipulated that the said exhibits of Jennie Amy, A, B, C, D, E, F, G, and H, including the oral testimony of Jennie Amy and Elliot Butterworth, in regard to the alleged divorce, and the said Exhibit 4 of Royal D. Amy, were duly excepted to at the time of the trial of said cause in the district court of the third judicial district, Utah Territory, and the same were taken and allowed subject to final argument of counsel and adjudication of the court; and it is further stipulated and agreed that Jennie Amy and Jane Butterworth are one and the same person.

31 In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

The court having taken certain testimony, subject to objection of counsel for Adelia Young *et al.*, now makes the following rulings on said testimony:

1. That the exhibits marked "Jennie Amy's Exhibits A, B, and C," upon examination and argument, were not allowed by the court, and the objection of said attorney to the same was and is duly sustained, and exception duly taken to the ruling of the court by Mr. Armstrong, attorney for Jennie Amy.

2. The testimony of Elliot Butterworth in regard to the receipt by him of a certain notice in a paper called the Silver Reef Miner and offered in evidence by Jennie Amy, marked "Jennie Amy's Exhibits D, E, F, G, and H," were ruled out, and the objection of Le Grand Young, attorney for Adelia Young *et al.*, was duly sustained; to which ruling Mr. Armstrong, attorney for Jennie Amy, duly excepted.

3. All the oral testimony offered by Jennie Amy in support of the alleged divorce between herself and Elliot Butterworth is stricken out, and the objection to the same by the attorneys for Adelia Young *et al.* and Royal D. Amy *et al.* are sustained; to which exception was duly taken by Mr. Armstrong, attorney for Jennie Amy.

4. The objection of Le Grand Young, attorney for Adelia Young *et al.*, to the exhibits marked "Royal D. Amy's Exhibit 4" was duly sustained; to which ruling Pence & Allen, attorneys for Royal D. Amy *et al.*, excepted.

The attorneys for Jennie Amy duly excepted to the ruling of the court in refusing to admit that portion of said document which was not objected to by Mr. Dickson on behalf of Jennie Amy.

32 That upon said record the district court entered judgement in favor of the said Adelia Young, Cedenia C. Young, and Delecta Maston denying the claim of Jennie Amy to be the widow of the said Oscar A. Amy, deceased, and denying the claim of Royal D. Amy *et al.*

That a motion was made for a new trial by Jennie Amy and also by Royal D. Amy *et al.*, which motions were denied, and an appeal from said order and from the judgement entered by said district court was duly taken to the supreme court of Utah Territory.

That the motion by Jennie Amy for new trial was made upon the following specification of errors assigned by Jennie Amy:

Specification of Particulars in which the Evidence is Insufficient to Sustain the Findings and Decisions of the Court.

1st. Those portions of the sixth finding of the court which find that the said Oscar A. Amy died leaving no wife, and that Jennie Amy was never legally divorced from Elliot Butterworth, her husband by a prior marriage, are not sustained by the evidence for

the reason that the evidence shows that a valid decree of divorce was rendered by the probate court of Washington county, Utah, in 1879, prior to her marriage with said Oscar A. Amy, which dissolved the marriage between the said Jennie Amy and the said Elliot Butterworth, and that at the time of the death of the said Oscar A. Amy said Jennie Amy was his lawful wife.

Errors in Law.

1st. The court erred in its conclusions of law that Jennie Amy "was never legally divorced from her former husband, Butterworth;" that the "probate court of Washington county never obtained jurisdiction of defendant Butterworth in said divorce proceedings," and that the said Jennie Amy was not the legal wife of said Oscar A. Amy at the time of his death.

2nd. The court erred in its second conclusion of law that the property passes to the next of kin instead of to Jennie Amy,
33 the lawful widow of the deceased.

3rd. The court erred in its third conclusion of law that the said Adelia Young, Cedenia C. Young, and Delecta Maston are entitled to said premises and property, and that the said widow, Jennie Amy, is not entitled thereto.

4th. The court erred in refusing to admit the judgement-roll in the divorce case of Butterworth *v.* Butterworth from the probate court of Washington county, marked "Jennie Amy's Exhibits A, B, and C," and in sustaining the objection thereto (the said judgement-roll showing that a valid decree of divorce was rendered in said probate court, dissolving the marriage of the said Jennie Amy (Jane Butterworth) with the said Elliot Butterworth).

5th. The court erred in excluding the testimony of Elliot Butterworth in regard to the notices clipped from the "Silver Reef Miner," a newspaper, and offered in evidence by Jennie Amy, marked "Jennie Amy's Exhibits D, E, F, G, and H," the said testimony tending to show that summons was duly issued and served by publication according to law in the said divorce case.

6th. The court erred in excluding the testimony of Jennie Amy in support of said divorce, the said testimony being offered to identify the plaintiff in said divorce case and to show that the said Jennie Amy was such plaintiff, and also to show that summons was duly issued in said divorce case.

7th. The court erred in refusing to allow Jennie Amy to prove, by the record in said divorce case in said probate court and by her own testimony and by the testimony of said Elliot Butterworth, that she was divorced from her former marriage with Elliot Butterworth.

That upon the record thus made the supreme court of Utah reversed the judgement and order of the district court and entered judgement in favor of Jennie Amy, holding that she was lawfully divorced from the said Elliot Butterworth, and that she was
34 the lawful widow of Oscar A. Amy, deceased.

From this decree of the supreme court of the Territory of

Utah Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark refused to appeal.

From said decree and judgement said Adelia Young, Cedenia C. Young, and Delecta Maston gave notice and have taken an appeal to the Supreme Court of the United States, making the following assignment of errors:

1. The supreme court of Utah erred. in admitting and considering the evidence of Jennie Amy's Exhibit A.

2. Said court erred in admitting and considering Jennie Amy's Exhibit B.

3. Said court erred in admitting and considering Jennie Amy's Exhibit C.

4. Said court erred in admitting and considering all three of said exhibits together.

5. Said court erred in admitting and considering Jennie Amy's Exhibit D.

6. Said court erred in admitting and considering Jennie Amy's Exhibit E.

7. Said court erred in admitting and considering Jennie Amy's Exhibit F.

8. Said court erred in admitting and considering Jennie Amy's Exhibit G.

9. The court erred in admitting and considering Jennie Amy's Exhibit H.

10. The said court erred in admitting the oral testimony of Jennie Amy in proof of her alleged divorce.

11. The court erred in admitting and considering the oral testimony of Elliot Butterworth in support of said divorce.

12. Said court erred in rendering judgement in favor of Jennie Amy and against said Adelia Young *et al.*

35 13. The said court erred in holding that the burden of proof was on Adelia Young *et al.* to show that said pretended judgement of divorce was void.

14. The said court erred in holding that said pretended judgement in the probate court of Washington county cannot be attacked collaterally in an action of this sort.

15. The said court erred in holding that Jennie Amy was lawfully divorced from Elliot Butterworth by the proceedings in the probate court of Washington county.

16. The said court erred in deciding in favor of Jennie Amy that she was the widow of Oscar A. Amy, deceased.

17. The said court erred in holding it was collaterally attacking the alleged divorce of Jane Butterworth, or Jennie Amy, for the reason that she, like any other person claiming to be the heir of Oscar A. Amy, was bound to show her right to inherit, and the burden of proof was on her to show this.

18. The court erred in holding that Adelia Young *et al.* could not question said divorce proceedings when introduced in evidence by Jane Butterworth, *re* Jennie Amy, and in holding that it was collaterally attacking said pretended divorce proceedings by requiring

her to affirmatively show her legal right to inherit the property of Oscar A. Amy, deceased.

19. The said court erred in admitting the evidence "Exhibit 4" of Royal D. Amy *et al.* or any part of said pretended record.

20. The said court erred in holding that the affidavit of the publisher of the Silver Reef Miner was sufficient.

21. The said court erred in holding that it was not necessary that there should be an order of the court directing publication.

22. The said court erred in holding that the only papers necessary in proof of publication were the complaint, summons, and affidavit of the printer, and judgement.

36 23. The said court erred in holding that said probate court prior to 1874 or ever possessed common-law or chancery jurisdiction.

24. The said court erred in holding that the said probate court of Washington county, Territory of Utah, was a court of general jurisdiction.

Wherefore Adelia Young, Cedenia C. Young, and Delecta Maston pray that said judgement and decree of the supreme court of Utah Territory be reversed and judgement entered in their favor.

LE GRAND YOUNG,
Attorney for Adelia Young, Cedenia C. Young, and Delecta Maston.

37 In the Supreme Court of the State of Utah, Regular June Term.

DECEMBER 21, 1895.

In the Matter of the Estate of OSCAR A. AMY, Deceased; JENNIE AMY, Appellant,
vs.
ROYAL D. AMY *et al.*, Appellants, and ADELIA YOUNG *et al.*, Respondents.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court herein be, and the same is hereby, reversed, and the cause remanded to said lower court, with directions to enter a decree in favor of the appellant, Jennie Amy, awarding her the entire estate of the decedent.

38 In the Supreme Court of the State of Utah, Regular June Term.

DECEMBER 21, 1895.

In the Matter of the Estate of OSCAR A. AMY, Deceased; JENNIE AMY, Appellant,
v.
ROYAL D. AMY *et al.*, Appellants, and ADELIA YOUNG, CEDENIA C. YOUNG, and DELECTA MASTON, Respondents.

In this cause motion having been made by Mr. Le Grand Young, counsel for respondents Adelia Young, Cedenia C. Young, and Delecta

Maston, that an appeal be allowed to the Supreme Court of the United States from that portion of the judgment of this court which awards the entire property of the deceased to Jennie Amy, and that the amount of the bond for costs to be given on such appeal be now fixed, it is ordered that the appeal as prayed for be, and the same is hereby, allowed, and the bond for costs is fixed in the sum of five hundred dollars ($500.00).

39 In the Supreme Court of the Ty. of Utah.

supreme court.

Appeal from the third judicial district court.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

Undertaking on Appeal.

Know all men by these presents that we, John H. White, Oscar W. Moyle, and Le Grand Young, of the city and county of Salt Lake, Territory of Utah, are held and firmly bound unto the clerk of the Supreme Court of the United States in the full and just sum of five hundred dollars, current money of the United States, to be paid to the clerk, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally by these presents.

Sealed with our seals and dated this thirty-first day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a session of the supreme court of Utah Territory, in a suit pending in said court between Cedenia C. Young, Adelia Young, Delecta Maston, Jennie Amy, Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, Sabra A. Clark, in the matter of the estate of Oscar A. Amy, deceased, a decree was rendered against the said Cedenia C. Young, Adelia Young, Delecta Maston, Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabra A. Clark, and in favor of Jennie Amy,

40 and the said Cedenia C. Young, Adelia Young, and Delecta Maston having obtained an order to remove the said cause to the Supreme Court of the United States and filed a transcrip- of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the aforesaid suit:

Now, the condition of the above obligation is such if the said obligors shall well and truly pay or cause to be paid to the said clerk of the Supreme Court of the United States, his heirs, executors, administrators, or assigns, all such sums as shall accrue to him, the said clerk as aforesaid, and charged to the said appellants in the prosecution of said appeal, then the above obligation to be void; otherwise to be and remain in full force and virtue.

JOHN H. WHITE. [SEAL.]
LE GRAND YOUNG. [SEAL.]
OSKAR W. MOYLE. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.

I, chief justice of the supreme court of Utah Territory, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

MERRITT,
Chief Justice.

Marked: No. 602. Jennie Amy *v.* R. D. Amy, Adelia Young, *et al.* Bond for costs on appeal to Supreme Court U. S. Filed Dec. 31, 1895. Ledyard M. Bailey, clerk supreme court, Utah.

41 STATE OF UTAH, } *ss:*
County of Salt Lake, }

Le Grand Young, being duly sworn, on his oath does say that he is acquainted with the market value of real property in Salt Lake City, and has been so acquainted for at least twenty years last past; that he is familiar with that pi-ce of property in controversy between Adelia Young, Cedenia C. Young, and Delecta Maston, on the one part, and Jennie Amy, on the other part, and described as follows, to wit, part of lots one and two, in block seventy, plat "A," Salt Lake City survey, and bounded as follows: Commencing at a point forty-nine and one-half feet south from the northeast corner of said lot one; thence south three rods; thence west eleven rods; thence north three rods; thence east eleven rods to the place of beginning, containing thirty-three square rods of ground, situated in the city and county of Salt Lake, State of Utah; that said property was, in 1891, of the value of $25,000, and is now of the value of at least $12,500.

LE GRAND YOUNG.

Subscribed and sworn to before me this 14th day of September, 1896.

[Seal of Ben W. Driggs, Jr., Salt Lake County, Utah, Notary Public.]

BEN W. DRIGGS, JR.,
Notary Public.

42 TERRITORY OF UTAH, }
County of Salt Lake. }

In the Supreme Court of the Territory of Utah.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

This is to certify that the foregoing papers constitute a statement of the facts in the case in the matter of the estate of Oscar A. Amy, deceased, decided in the supreme court of Utah Territory, December 21, 1895, on appeal from the district court of the third judicial district, Utah Territory, and that the foregoing statement includes the rulings of the court in the admission or rejection of evidence, which was excepted to.

I further certify that the following papers constitute a transcript of the proceedings, including the judgement and decree of said supreme court.

Sept. 21, 1896.

SAM'L A. MERRITT,
Late Chief Justice of the Supreme Court of Utah Territory.

43 UNITED STATES OF AMERICA, *ss:*

To Jennie Amy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to an appeal allowed by the supreme court of the Territory of Utah, wherein Adelia Young, Cedenia C. Young, and Delecta Maston are the appellants and you, the said Jennie Amy, are the respondent, to show cause, if any there be, why the judgment and decree rendered in the said supreme court on the 21st day of December, 1895, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of the State of Utah, this 21st day of September, A. D. 1896.

C. S. ZANE,
Chief Justice of the State of Utah.

Attest: —— ——,
Clerk Supreme Court of Utah.

Service of a copy of the above citation is hereby admitted this 21st day of September, A. D. 1896.

S. P. ARMSTRONG,
Attorney for Respondent.

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4 *Findings of Fact and Conclusions of Law.*

11720.

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

This is a case that comes up on appeal from the probate court of Summit county, Utah Territory, C. O. Whitemore, the surviving administrator of the estate of Oscar A. Amy, deceased, appearing in person; Pence & Allen, attorneys-at-law, appearing for Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark, and Jennie Amy appearing by her attorneys, Messrs. S. P. Armstrong and W. H. Dickson; Adelia Young, Cedenia C. Young, and Delecta Maston appearing by their counsel, Le Grand Young, and all the parties having appeared in the case, and testimony having been taken, and the matter having been submitted to the court, and the court having been fully advised in the premises, now finds the following facts and conclusions of law:

1. That Lavira C. Smith in her lifetime and at the date of her death was the owner in fee-simple of the following-described premises and property, to wit: Part of lots one and two, in block seventy, plat "A," Salt Lake City survey, and bounded as follows: Com-

mencing at a point forty-nine and one-half feet south from the northeast corner of said lot one, thence south three rods, thence west eleven rods, thence north three rods, thence east eleven rods to the place of beginning, containing thirty-three square rods of ground, with the tenements and appurtenances, situated in Salt Lake county, Utah Territory.

2. That on the 1st day of January, 1893, the said Lavira C. Smith died intestate in Salt Lake City, Utah, leaving surviving her two children, the first and eldest a daughter of the name of Lavira A. Smith, by one Samuel Smith, deceased, and the second a son by the name of Oscar A. Amy, the aforesaid intestate, by one Dustin Amy.

3. That her estate was duly administered and the said property of the said deceased, Lavira C. Smith, was distributed equally between her said children, share and share alike.

4. That afterwards, to wit, on the 18 day of December, 1888, the said Lavira A. Smith, the daughter of the said Lavira C. Smith, died intestate, and, so far as appears from the records in this case, leaving no father or mother, husband or children, and no brothers or sisters of the whole blood, but leaving her surviving the said Oscar A. Amy, her half-brother and son of her mother, and several other half brothers and sisters, the children of her father by another wife.

5. The said Oscar A. Amy took possession of said premises and property belonging to his said half-sister and occupied the same during his lifetime, and that letters of administration were taken out upon the estate of said Lavira A. Smith, deceased, but said estate is not yet settled, but is in course of administration.

6. Said Oscar A. Amy died intestate in the county of Summit, Territory of Utah, on the 26 day of May, 1891, leaving no issue, no wife, father, mother, brother, or sister of the whole blood and no uncles, but leaving him surviving three maternal aunts or sisters of his mother, namely, Adelia Young, Cedenia C. Young, and Delecta Maston; also brothers and sisters of the half blood, the children of Dustin Amy, father of the said deceased, Oscar A. Amy, by a former wife, which said half brothers' and sisters' names are as follows, to wit, Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark, and *Sabia A. Clark, and* that the applicant, Jennie Amy, claims to be the widow of said deceased, Oscar A. Amy; but the court finds that said Jennie Amy was heretofore and prior to her alleged marriage to Oscar A. Amy, deceased, married to one Elliot Butterworth, from whom she was never legally divorced.

7. That the said Lavira C. Smith at the time of her death had five sisters, all of whom survived her, two of whom, namely, Merinda Kimball and Hulda Ballantyne, died long prior to the death of said Oscar A. Amy, and that only three of the sisters of the said Lavira C. Smith, to wit, the said Adelia Young, Cedenia C. Young, and Delecta Maston, survived the said Oscar A. Amy.

Conclusions of Law from the Foregoing Findings of Facts.

First. That the property having descended to the said Oscar A. Amy from his mother and sister, all of those who are not the blood of such ancestor and the kindred of the said Oscar A. Amy, deceased, are excluded from the inheritance.

Second. That said Oscar A. Amy leaving no father or mother, wife or issue, the property passes to the next of kin, who are the blood of the ancestors from whom it came and who are the next of kin in that line to said deceased.

Third. That the said Adelia Young, Cedenia C. Young, and Delecta Maston being the blood of the ancestor, who are also the next of kin in that line to the said Oscar A. Amy, deceased, they are entitled to said premises and property in equal degree, and a decree shall be entered accordingly.

February 9, 1895.

MERRITT, *Judge.*

Attest:

[SEAL.] DAVID C. DUNBAR, *Clerk,*
By GEO. D. LOOMIS, *Deputy.*

(Endorsed:) Filed Feb. 19, 1895. David C. Dunbar, clerk, by Geo. D. Loomis, deputy.

7 *Decree.*

11720.

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

This case came on regular- for trial on the — day of January, 1895, C. O. Whittemore, the surviving administrator of the estate of Oscar A. Amy, deceased, appearing in person; Pence & Allen appearing for Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark, and Jennie Amy appearing by her attorneys, Messrs. S. P. Armstrong and W. H. Dickson; Adelia Young, Cedenia C. Young, and Delecta Maston appearing by their counsel, Le Grand Young. The case was tried on appeal from the probate court of Summit county, Utah Territory, before the court sitting without a jury. The witnesses were examined and testimony taken in behalf of all the parties hereto, and, the evidence being closed, the case was submitted to the court for consideration and decision, and after due deliberation thereon the court delivered its findings of facts and conclusions of law in writing, which are filed, and has ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that Adelia Young, Cedenia C. Young, and Delecta Maston are the lawful owners and claimants

and entitled to the possession of the estate, premises, and property owned by the late Oscar A. Amy, deceased, and the same is hereby awarded and distributed to them in equal portions; which said property is described as follows, to wit: Part of lots one and two, in block seventy, plat "A," Salt Lake City survey, and bounded as follows: Commencing at a point forty-nine and one-half feet south from the northeast corner of said lot one, thence south three rods, thence west eleven rods, thence north three rods, thence east eleven rods to the place of beginning, containing thirty-three square
8–72 rods of ground, together with the tenements and appurtenances thereunto belonging, and situated in Salt Lake county, Utah Territory.

Done in open court this 9th day of February, 1895.

MERRITT,
Judge of said District Court.

Attest:
[SEAL.] DAVID C. DUNBAR, *Clerk*,
By GEO. D. LOOMIS, *Deputy.*

Indorsed: Filed Feb. 19, 1895. David C. Dunbar, clerk, by Geo. D. Loomis, deputy.

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73 In the Supreme Court of Utah Territory.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

Opinion of the Court.

KING, *J.:*

From the record before us it appears that Dustin Amy was married to Leonora Scott Amy, by whom he had several children, who are known herein as Royal D. Amy *et al.* Subsequently he married Lavira C. Smith, widow of Samuel Smith, who bore him one child, the decedent herein; that said Lavira C. Smith-Amy had one child, Lavira A. Smith, by her first marriage; that in 1883 said Lavira C. Smith-Amy died, leaving surviving her as her only heirs (her husband being dead) Oscar A. Amy and Lavira A. Smith, and by order of the probate court of Salt Lake county her estate was distributed in December, 1888, to her said heirs. Two days later Lavira A. Smith died intestate, leaving surviving her no children nor father nor mother. In April, 1886, Oscar A. Amy married Jennie Amy, and in May, 1889, he died intestate, without issue, leaving surviving him the said Jennie Amy, who claims his estate as his widow, and his half brothers and sisters, named herein as Royal D. Amy *et al.*, and his aunts, Adelia Young, Cedenia C. Young, and Delecta Maston, sisters of his deceased mother. The estate left by decedent consists of valuable property in Salt Lake City, and in the probate court Jennie Amy petitioned for the distribution of the entire estate to her, alleging that she was his wife and sole heir; that he died leaving no brothers or sisters of the whole blood, the blood of the mother of said decedent; that the property of which he died

seised was inherited by him from his mother and was originally acquired and owned by her. Adelia Young *et al.* also prayed for a distribution of the estate, representing that they were the maternal aunts of the deceased and his only heirs, and averring that Jennie Amy was not the widow of the deceased. Royal D. Amy *et al.* alleged in their petition for distribution that they were the sole
74 heirs of deceased; that the estate was originally acquired and owned by Dustin Amy, and that it came by devise from him to said deceased. They also denied that Jennie Amy was decedent's widow. The probate court distributed all the estate to Adelia Young *et al.*, and appeal was had therefrom to the district court, where the judgement of the probate court was affirmed.

The questions presented for our consideration are: (1.) Was Jennie Amy lawfully divorced from her first husband, Elliot Butterworth? (2.) Did the estate come from decedent's father or mother? (3.) If the divorce was valid, is Jennie Amy the sole heir of decedent or do his half brothers and sisters share in the estate?

1. In support of her contention that she was the sole heir of deceased and had been lawfully divorced from her former husband Jennie Amy testified that she was married to deceased in 1886 and lived with him as his wife until his death. During this period she bore him two children, both of whom died prior to his decease; that in 1876 she married one Elliot Butterworth, and thereafter was divorced from him. Elliot Butterworth testified that he was married to Jennie Amy, and that when she instituted divorce proceedings he was a resident of Franklin, Idaho; that he received a summons from the probate court and also at least six copies, each of a different issue, of the Silver Reef Miner, a newspaper containing a copy of the summons, and that he cut the notices out (five of which witness produced in court). He also stated that he believed the divorce to be valid, and the following year married again, and had lived with his wife continuously until the present; that she had borne him seven children. The original complaint, duly verified, and which charged desertion upon the part of the defendant in that action, together with a decree of the court rendered in the case, were offered, and also a copy of the Silver Reef Miner of the issue of July 30, 1879, showing publication of service in due form. Counsel for Royal D. Amy *et al.* and Adelia Young *et al.* objected, claiming, among other things, that they were
75 incompetent, because the record showed no affidavit or order of publication and no proof of service of summons. The proceedings of the probate court showed that the attorney for plaintiff filed an affidavit averring that defendant, Elliot Butterworth, was a non-resident of Utah; that his last known place of residence was Franklin, Idaho, and prayed for service by publication. The affidavit of publication was made by the publisher of the Silver Reef Miner, and stated that "he has within the last forty days forwarded to the defendant four different copies of the above-named paper, at four several times, containing summons in the above-entitled action, and that said summons was a copy of the same issued by the clerk of the probate court of Washington county, Territory of Utah, and

that the same was addressed to the defendant in the above-entitled action at Franklin, Idaho Territory." A certified copy of the minutes of the probate court showed that the case was heard September 3, 1879, and that the affidavit of the publisher was presented as "proof of publication of summons;" that plaintiff appeared in person and by her attorney and offered testimony, and that the court ordered a decree to be entered for plaintiff. Attached to a certified copy of the minutes was the certificate of the clerk "that the foregoing are all the papers which are filed in said cause." Counsel for Jennie Amy objected to the introduction of any of the papers in said cause excepting the complaint and decree of divorce, and counsel for the other parties objected to any of the papers being received. The court finally sustained the latter's objection, holding that the statute relating to publication of summons had not been followed and that the divorce was invalid.

Did the court have jurisdiction to render the decree in the case? This involves the question of what is sufficient to constitute substituted service. The statute of Utah in force at that time provided that when the fact of non-residence shall appear by affidavit to the satisfaction of the court, and it shall in like manner appear
76 that a cause of action exists against the defendant, or that he is a necessary party to the action, the court may grant an order that the service be made by publication of summons, and the order shall direct the publication to be made in some newspaper, to be designated, as most likely to give notice to the person to be served. Proof of service shall be the affidavit of the publisher showing the same and an affidavit showing deposit of a copy of a summons in the post-office, if the same shall have been deposited. The publication shall be inserted four times consecutively, the first insertion being at least forty days before the time for answer, and a copy of which shall be immediately deposited, postage prepaid, in the post-office, directed to defendant at his last known place of residence or business.

The decree rendered in the cause contains a recital of due service of process by publication upon the defendant; and the appellant, Jennie Amy, contends that the probate court is a court of record, and in this collateral proceeding the judgement therein rendered cannot be impeached; that the record imports verity, and that any of the papers which may be found in the files cannot be received to contradict the recital of due service. Respondents claim that when jurisdiction is to be obtained by publication against a non-resident there is no presumption in favor of the record, and jurisdiction does not attach unless the statute is strictly followed. It becomes necessary to determine whether the probate court was a court of superior or general jurisdiction. Prior to 1874, under various acts of the legislature, the probate courts possessed common-law and chancery jurisdiction and authority to try and determine crimin*la* cases. While many of these enactments conferring this jurisdiction upon such courts were unconstitutional, they indicate the purpose of the legislature to treat them as courts of general jurisdiction. By the Poland bill they were shorn of all civil, chancery, and criminal

jurisdiction excepting in divorce proceedings. From the earliest history of the Territory these courts have exercised jurisdic-
77 tion in divorce cases, and, though Congress stripped them of powers theretofore exercised, it did not deprive them of jurisdiction in this class of cases until 1887. They were courts having a seal, clerk, and kept records of their proceedings, and the general procedure act governing district courts was applicable to them Orders and writs were issued by the clerk under the seal of the court. This, we think, constituted them courts of record. Vassault *v.* Austin, 36 Cal., 696; McCauley *v.* Fulton, 44 Cal., 360; Robinson *v.* Fair, 123 U. S., 87; 9 Sup. Ct., 30; Van Fleet, Coll. Attack, 814–827.

It is often stated that the presumption- of law are in favor of the jurisdiction and of the regular proceedings of superior courts—of courts of general jurisdiction proceeding according to the course of the common law; but this statement does not aid us much in determining what are courts of general jurisdiction. The term "general jurisdiction" would imply unlimited powers, but we have no courts of unlimited powers in this Territory. A court of record, proceeding according to the regular ordinary course of proceeding of the territorial jurisdiction, and whose judgements may be reviewed by writs of error or appeal, is a court whose proceedings and judgements import verity, and until reversed will protect those obeying them. Mere special tribunals, created for some special or temporary purpose, governed by some special rule or proceeding, are not courts of record and cannot claim such immunities for their judgements or acts. "The true line of demarcation between courts whose decisions are conclusive if not reversed and those whose proceedings are nul-ities if the jurisdiction does not appear on their face is this: A court which is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgement without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity and not to be impugned by averment or proof to the contrary, is of the first description. There can be no judicial inspection behind the judge-
78 ment save by appellate power." Grignon *v.* Astor, 2 How., 341; Borden *v.* State, 54 Am. Dec., 221.

The probate court had the power to hear and determine the class of cases confided to it by the legislature, and it is not saying too much to aver that courts dealing with divorce proceedings and the settlement of estates of deceased persons, at least so far as their effect on property rights and social relations are concerned, are as important as any courts with which we have to deal. We think that every principle of justice dictates that the same presumption should attach to their proceedings as other courts. For the repose of titles, the security of property, and the interests of the public a rule should be adopted which would render secure from collateral attack their proceedings. At any rate, we see no good reason why a different rule should be applied to their judgements than governs decrees of district courts. In one view the probate court had unlimited jurisdiction over divorce cases. It is true such cases could

be removed to the district court or, after final judgement, an appeal would lie, but it had jurisdiction to render a final decree and judgement. "The word 'limited' seems to be used sometimes carelessly instead of the term 'special,' for I take the true distinction between courts to be such as possess a general and such as have only a special jurisdiction for a particular purpose or clothed with special powers for the performance of special duties, beyond which they have no manner of authority, and those special powers to be exercised in a summary way, either by a tribunal already existing for general purposes or else by persons appointed or to be appointed in some definite form. Some tribunals with special powers for adjudication in particular cases under the various names of 'commissioners,' 'surveyers,' 'appraisers,' 'committees,' 'contractors,' 'overseers,' and the like abound in our statute books, little or in nowise relating to the general administration of justice, whose modes of proceeding are prescribed by the statute by which they are erected, and unless their proceedings on the face of them show a compliance with
79 the directions required by the statute under which they act it never could be known whether they acted within their jurisdiction or exceeded it." Obert *v.* Hammel, 18 N. J. Law, 73.

Counsel for respondents concede that the probate court, at the time this decree was rendered, was a court of general jurisdiction in matters pertaining to the guardianship of minors and the administration of estates of decedents, but, as we understand his position, in dealing with divorce cases it was a court of special or limited jurisdiction. We see no good reason for holding it to be an inferior court while adjudicating questions of equally as much, if not greater, importance, while its proceedings were being conducted in conformity with the general practice prevailing in courts of superior jurisdiction. Because by special enactment jurisdiction is conferred upon a tribunal it does not necessarily follow that such tribunal thereby becomes one of special or limited jurisdiction. In many of the States there has been special legislation regarding the subject of divorce. Indeed, the subject has been taken from ecclesiastical courts, and in some jurisdictions the legislatures have been prohibited from granting divorces. In other words, by special legislation the authority to determine the matrimonial status has been referred to certain courts; but, because of this character of legislation, we do not think the courts exercising the jurisdiction conferred are of special or limited jurisdiction and the judgements rendered therein entitled to different presumptions than followed in determining other cases. The distinction is obvious between conferring jurisdiction over a new subject-matter or a class of cases to be conducted in the manner prescribed in the ordinary course of procedure of the court and in conferring on the court special powers to be exercised in a special manner. The case relied on so strongly by respondents seems to recognize this principle: "When the special powers conferred are brought into action according to the course of that law (common law) and chancery proceedings by regular process
80 and personal service where a personal judgement or decree is asked or by seizure or attachment of the property where a

judgement *in rem* is sought, the same presumption of jurisdiction will usually attend the judgement of the court as in cases falling within its general powers."

Galpin *v.* Page, 18 Wall., 371.

Regarding probate courts as courts of general jurisdiction the question that naturally suggests itself is, What presumptions attend such courts? And, first, it is to be observed that probate courts had jurisdiction to determine materimonial status of persons. It had jurisdiction of the subject-matter. Being a court of competent jurisdiction, its judgement cannot be treated as a nullity, even though there be irregular process until reversed, "for there is no principle better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done until the contrary appears. This rule applies as well to any judgement or decree rendered in the various stages of their proceedings from their initiation to their completion as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of the record, which thenceforth proves itself without referring to the evidence in which it has been adjudged." Voorhees *v.* Bank, 10 Pet., 472. The supreme court of North Carolina, in an opinion by Chief Justice Ruffin, speaking of a title based on attachment and garnishment against an absconding debtor, says that "the general rule has not been questioned by defendant's counsel that a judgement of a court having jurisdiction of the subject-matter and proceeding according to the course of the common law * * * cannot be collaterally impeached, but until it be set aside by the same court or reversed in a superior tribunal is conclusive. Such is unquestionably the rule of the law. The reason is the judgement itself is an evidence of the right determined in it or debt recovered, and is evidence so high that a denial of the right can only be made in the form of an appeal denying the existence of the record
81 alleged. * * * But we are not aware of any instance in which the subject-matter is within the jurisdiction and a cause is once constituted in a court of record that the judgement is not conclusive between the parties or any other plea admissible except *nul tiel* record, and that without regard to the process by which the action was commenced."

Skinner *v.* Moore, 30 Am. Dec., 155.

After determining that the court has jurisdiction of the subject-matter, the next inquiry is, Did it have jurisdiction of the person? In collateral proceedings this question can only be determined by an inspection of the record. If it is silent, then the presumption follows that what ought to have been done was not only done, but rightly done. In a collateral attack the omission to affirm the jurisdictional fact upon the record will be supplied by the presumption that the court acted with due authority, and its judgement will be as valid as though any fact necessary to jurisdiction affirmatively appeared. But the record in this case is not silent upon this jurisdictional question. The decree of the court recites, among other

things, "that the cause came on regularly for hearing, and that it appeared to the court that said defendant was duly served with process by publication." These findings are as conclusive upon all parties in a collateral proceeding as any adjudication of the court can be. It must be presumed that they were supported by sufficient testimony not set forth in the record. "Thus, though the return of the summons against A B certifies a service of the summons upon C D and the judgement states that A B has been summoned, the record is not necessarily contradictory. The error in the service of process may have been corrected by service of summons on the proper persons, and, since statement to this effect is made by the court, it will be presumed that it acted upon ample evidence and with due deliberation before making such statement, and the judgement will be impregnable to any collateral assault." 1 Freem., Judgm., 130. Mr. Freeman further states that a finding or a recital showing that the court had jurisdiction is, in the
82 vast majority of the States, not disputable when a judgement based thereon is drawn in question collaterally. Accordingly it has been held that the fact that summons served by publication omitted the name of one of the defendants, to whom property had been assessed, was not fatal to the decree, because, from the recital of due service, it was conclusively presumed that the court had sufficient proof of service, though the judgement-roll failed to disclose it. Reily *v.* Lancaster, 39 Cal., 354; Branson *v.* Caruthers, 49 Cal., 375. And a recital in proceedings by an administrator to sell land that proof was made "of the service of notice according to provisions of the statute" was held sufficient against collateral attack. Bowen *v.* Bond, 80 Ill., 351. A recital that "due notice has been given to the defendant" cannot be contradicted in a collateral action. Richards *v.* Skiff, 8 Ohio St., 586. And, where a probate record of the final settlement of an administrator showed personal appearance of all the heirs by name, they were not allowed to contradict it in a collateral proceeding. Hardy *v.* Gholson, 26 Miss., 70; Van Fleet, Coll. Attack, 479. In Brickhouse *v.* Sutton (N. C), 5 S. E., 380, the court says: "Every intendment is in favor of the action of the court and its sufficiency. The ascertainment and recital of facts in the record by the court imports verity and binding effect, and must be so treated for all proper purposes of the action till, in some proper way, the action of the court shall be successfully impeached. Thus, in this case, it must be taken that the court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with process against them—that is, served regularly and effectually;" and in Goodell *v.* Starr, 127 Ind., 200; 26 N. E., 793, the court follows the decision just referred to and states that "the case of Quarl *v.* Abbett (Ind. Sup.), 1 N. E., 476 (and others cited), laydown that which we regard as the correct rule on that subject. When notice is given by publication the judgement of the court, acting upon such notice, that the publication and the affidavit upon which
83 it is based are sufficient to give it jurisdiction is conclusive upon all the parties as against a collateral attack;" and in

the case of Goodwin *v.* Sims (Ala.), 5 South., 587, it is stated that "the rule deducible from these decisions is that when the court, by the recitals in the decree, ascertains the jurisdictional fact such adjudication is final and conclusive when the decree is collaterally assailed; and, if the decree is silent, the jurisdictional fact may appear from other parts of the record. As the entire record imports absolute verity, the recitals in the decree may be explained, limited, or qualified by other parts of the record. The entire record may be looked to for the purpose of ascertaining the jurisdictional facts, when there is no finding by the court, for jurisdiction is acquired from the facts as they appear in the entire record, but when the power to ascertain the jurisdictional fact is conferred on the court and the court adjudges that it has jurisdiction it is not overcome or destroyed because other parts of the record may not be sufficient to uphold such finding. "1 Black, Judgm., 273, 274, 278; 1 Freem., Judgm., 126, 132; Hall *v.* Law, 102 U. S., 464: Adams *v.* Cowles (Mo. Sup.), 8. S. W., 711; Kinney *v.* Lewis, 2 Utah, 517; Callen *v.* Ellison, 13 Ohio St., 454; Shawhan *v.* Loffer, 24 Iowa, 226; Nash *v.* Church, 10 Wis., 244; Blasdel *v.* Kean, 8 Nev., 308; Davis *v.* Robinson, 70 Tex, 397; 7 S. W., 749; Waterhouse *v.* Cousins, 40 Me., 333.

Respondents contend, however, that the recitals in the decree are contradicted by other papers appearing in the record. In order to determine what papers are a part of the record reference must be made to the compiled laws of 1876. The law in question did not require the filing of the affidavit or order of publication. Section 1428 provides that "immediately after entering the judgement the clerk shall attach together and file the following papers, which shall constitute the judgement-roll: The complaint. the summons, with the affidavit of proof of service, and a copy of the judgement."

It has been held repeatedly in California that proof of service
84 does not include the affidavit or order of publication. Sharp *v.* Daugney, 33 Cal., 512; Hahn *v.* Kelley, 34 Cal., 404; Quivey *v.* Porter, 37 Cal., 464. We adopted the statute just referred to from California with this construction, and will therefore follow the interpretation placed upon it by the California courts. People *v.* Ritchie (Utah), 42 Pac., 209; Suth. St. Const., 256. By amendment the affidavit and order of publication are now required to be made part of the judgement-roll. The affidavit for publication and the order of the court issuing thereon not being a part of the judgement-roll, the court will not look into the record to ascertain whether or not they were properly made or filed. Their absence from the files of the cause is immaterial and cannot be proved to overcome the presumption of regularity. In Hahn *v.* Kelly, *supra*, the affidavit and order of publication were offered for the purpose of contradicting the presumption of legal service on which judgement had been rendered, but the court say: "So, for the purpose of determining whether the want of jurisdiction is shown by the record, we can only look to the summons, the affidavit of the printer, the complaint with the default indorsed thereon, and the judgement. The affidavit, made for the purpose of obtaining an order for publi-

cation, and the order of the court directing publication, for all the purposes of the question before us, must be disregarded, or, in other words, presumed to have been all that the law requires." See Harvey *v.* Tyler, 2 Wall., 344; Hall *v.* Law, 102 U. S., 463; Applegate *v.* Mining Co., 117 U.S., 269; 6 Sup. Ct., 742; Estate of Newman, 75 Cal., 213; 16 Pac., 887. We again quote from Hahn *v.* Kelly: "We consider the true rule to be that the legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. Where the record is silent as to what was done it will be presumed that what ought to have been done was not only done, but rightly done. If the record merely shows that a summons was served on the son of defendant it will not be presumed that it was served on the defendant. If
the affidavit of the printer shows that the summons was
85 published one month, it will not be presumed that it was
published three. To avoid any misapprehension, we deem it proper to add that so far we have assumed, for the purposes of the argument, that the record, aside from that portion of it which is denominated the 'proof of service,' is silent upon the question of service; but it may happen that other portions of the record may also speak upon that question. If so, what they say is not to be disregarded. On the contrary, in determining the question whether a want of jurisdiction is apparent upon the face of the record we must look to the whole of it, and report the responses of all its parts. To illustrate: Suppose that portion of the judgement-roll denominated the 'affidavit of proof of service' shows that personal service was made upon the son of defendant and the remainder of the record says nothing about service, we then have a want of jurisdiction appearing upon the face of the record; but suppose the judgement states that the defendant appeared, or that personal service was made upon him, or something else that is equivalent, as it frequently does, the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case. * * * So in a case of service by publication, if the affidavit of the printer states that the summons was published one month and yet the court, in its judgement, states that it was published three, or that service has been had upon defendant, it will be presumed that other proof than that contained in the judgement-roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it."

We think that the court, having found judicially that service was legally made upon the defendant Butterworth, in this collateral proceeding recourse could not be had to the files in the case aside from the judgement-roll, and that no evidence would be admissible other than that contained in the judgement-roll *dehors* the recital
in the judgement. The question then arises, Is there anything
86 in the affidavit of publication contradictory of the recitals in
the decree? We think not. The affidavit of service is rather one of posting. All that is there stated is entirely consistent with the recitals in the judgement. The affiant may have mailed the

papers, as stated in the affidavit, but this affidavit does not disprove the idea that the publication was made four times consecutively, or that the first insertion was at least 40 days prior to the date for answer. The affidavit is not proof that the only publication was as stated therein. There may have been other affidavits showing publication in four consecutive issues of the paper, and that the first publication was at least 40 days before the time for answer. This affidavit is silent upon these points, and, as stated in the opinion from which we have just quoted, if the affidavit of the printer states that the summons was published one month, and yet the court in its judgement states that it was published three, it will be presumed that proof other than that contained in the judgement-roll was made. Indeed, from the testimony of Butterworth it is quite apparent that the affidavit did not contain a statement of all that did actually occur with reference to the publication of the summons.

We think there was nothing in the judgement-roll contradicting the recitals in the judgement, and that the absence of the order of the court for publication in no manner vitiated the decree rendered in the case; and it is to be noted here that, notwithstanding the certificate of the clerk that the papers above referred to were the only ones filed in the cause, there was nothing requiring the filing of the order of publication, and the certificate is not incompatible with the presumption of the existence of such order duly made by the court. The case of Colt *v.* Haven, 30 Conn., 195, is instructive upon this question. Service was constructive, as appears from the return of the officer, the writ having been left at defendant's house. The language of the judgement was: "This action came to the present term of this court." The parties against whom it was presented, in
87 opposition to the record, for the purpose of showing that the judgement was void, offered to prove by defendant in the judgement and others that at the time when the copy of the writ was left in service by the officer, as claimed, at his usual place of abode he was an not inhabitant of the town or of any place in the State, and that the writ never was in any way served, and that at the time it was claimed to have been served he was residing out of the State. This testimony was rejected. The court say: "But counsel for defendant urged the extreme hardship to which a party may be subjected if he may not deny and disprove the service of the writ when he can clearly show in fact no service was ever made on him, and that he never had notice of the suit in any form, and never heard of the judgement against him until it was made the ground of an action." They say with great emphasis, and the argument is certainly a forcible one: "Can it be that the clerk of the court may fabricate a record or an officer make a false return of service and yet there be no escape for one who is thus, by a judgement in a suit, made heavily indebted or found guilty of a wrong, when in fact he is perfectly innocent and never owed the debt, and could show it clearly if he had a chance." * * * "It is so necessary that confidence should be reposed in courts of a high character, as well as the records of such courts, that on the whole, and in view of

all the considerations affecting the subject, it is the only safe rule to give the decisions of courts of general jurisdiction full effect so long as they remain in force rather than to leave them open to attack in every way and on all occasions. Being domestic judgements, they can, if erroneous, be reviewed by proceedings instituted directly for the purpose and reversed on error by new trial, and, if the danger is e-minent and special, relief can be temporarily if not finally obtained by application to a court of equity. * * * Any other rule with regard to judgements of such courts would be attended with great embarrassment and would be very dangerous in its general operation. The general good clearly requires and has therefore
88 established the rule that domestic judgements of courts of general jurisdiction cannot be attacked collaterally." In Illinois it was held that where a decree recited due and legal process had been made and the process found in the record was issued three terms before and showed a defective service, it was presumed that another process had been issued and served, as the time had been sufficient within which to do it. Mulvey *v.* Gibbons, 87 Ill., 367. And in another case, where the summons found among the papers was returnable at the July term upon which the service was too short, the court held that that would not control a recital of service made at the August term, as the presumption was that a new writ had been issued and duly served. Mathews *v.* Hoff, 113 Ill., 95. The affidavit for publication is in the nature of evidence, and its sufficiency cannot be questioned in a collateral proceeding. Banta *v.* Wood, 32 Iowa, 469. From the service of process the court has jurisdiction, and, because of some irregularity or defect in the service, ordinarily the judgement would not be void. In the case of Sargent *v.* Bank, 12 How., 378, a paper was found in the files purporting to show how notice was given of service of process, and which was contradictory of the recital in the judgement. It was held to be no part of the record and could not be received to impeach its verity. The court there say: "The real record informs us that legal and sufficient notice was given to the heirs of Samuel Sargent, but whether by this paper or by what other mode, except that it was legal and sufficient, we are not told and are not at liberty in this case to indulge in inferences against the verity of the record. It is a principle well settled, too, in judicial proceedings that whatever may be the powers of a superior court in the exercise of regular appellate jurisdiction to examine the acts of an inferior court the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the course of appellate power. To permit the
89 conve-se of this principle is to unsettle nine-tenths of the rights and titles in any community and lead to infinite confusion and wrong." In line with the expressions in Hahn *v.* Kelly it was held that when the statute provided that the affidavit of the printer or publisher "shall be sufficient evidence of publication," and the certificate of the publisher was not verified, the statute did not make the affidavit exclusive proof of service, and that, as the record contained a recital of due proof of service, the presumption was that

other proof was given. Raley *v.* Guinn, 76 Mo., 263; Sargeant *v.* Bank, 4 McLean, 339, Fed. Cas. No. 12360; Van Fleet, Coll. Attack, 835, 836.

We do not mean in this opinion to decide what defects in service would, in a collateral proceeding, be sufficient to overthrow the presumption of verity. Reference has been made more or less to authorities opposite to the general question, but the conclusions which we reach are based on the facts of this particular case and the equities presented for our consideration.

Respondents also contend, no matter what presumptions of regularity attend a judgement, if it appears that it was taken against a non-resident the presumption ceases. In support of this view, Galpin *v.* Page, 18 Wall., 365, is cited. It must be remembered that in that case there was no recital of due service of process, and the decree introduced had been reversed by the supreme court of California upon the ground that service was insufficient to give jurisdiction; also, the decree was introduced in a Federal court as a basis for relief, the granting of which, under all the circumstances, would have been inequitable and unjust. It seems from a careful reading of the case that the decree would still have been held good as to the rights of third parties having equitable interests, and that the court regarded it, at least for some purposes, as merely voidable. Even if it should be conceded that, the fact of non-residence being apparent upon the record, the presumption of verity does not attach, could it not with propriety be argued that this presumption
90 would be reinstated and entitled to its legal effect by the solemn adjudication in the decree that due service had been made? It would seem there must be a distinction between cases where the judgement is silent about service and one where it directly affirms the service as a jurisdictional fact. Many of the cases cited in respondent's brief in support of this contention present wholly different features from those existing in the case at bar. In the case of Thompson *v.* Whitman, 18 Wall., 457, a judgement which had been rendered in a special proceeding, as well as in a foreign suit, was under consideration. In the case of Noble *v.* Railroad Co., 147 U. S., 173; 13 Sup. Ct., 271, the question before the court was one of presumptions merely, and not the effect of recitals in the decree; and the case of Romaine *v.* Insurance Co., 28 Fed., 625, does not present the question of collateral attack. Cissell *v.* Pulaski Co., 10 Fed., 893, involved the question of a judgement rendered in a special proceeding.

In the case at bar the validity of a domestic judgement is involved and the question of special proceedings is not presented. In saying this we are not unmindful of the fourteenth amendment of the Constitution and the construction which has been placed upon it. Jurisdiction can be obtained by constructive service and the judgement rendered is "due process of law." The State is sovereign. It has a right to provide for bringing into its courts those whose rights are involved or for the effectual adjudication of the rights of others whose appearance may be necessary. It has the right to provide tribunals to determine the matrimonial status of persons domiciled

within its limits and such determination is a judgement *in rem*. Of course, a personal judgement cannot be rendered against a non-resident without personal service. Pennoyer *v.* Neff, 95 U. S., 714. Why in a collateral proceeding a court should attach greater inviolability to a domestic judgement rendered against a resident than one obtained against a non-resident is difficult to understand. In passing upon the questions before it its proceedings are in
91 the same general manner and according to the same general practice. In one case its judgements import verity. According to many authorities in the other case its judgements are subject to collateral impeachment and no presumptions of verity attend them. It seems folly to predicate this distinction upon the assertion that constructive service was unknown to the common law. Conceding this to be true, what follows? Our courts are creatures of statute. Their powers and their proceedings are largely determined by legislative enactment. Service of summons upon residents is provided for by statute. Perhaps no greater power was conferred upon the courts by these enactments, but a different mode of exercising an old and inherent power was pointed out. It seems to the writer of this opinion that Galpin *v.* Page is founded upon the fallacy that constructive service is in derogation of some venerated principle, and to be regarded with disfavor. The growth of civilization, the development of commerce, the establishment of business relations, the homogeneousness of the people of our si-ter States seem rather to commend this practice of obtaining jurisdiction of the person because of the necessities that arise, and the great inconvenience, not to say embarrassments, that would result if jurisdiction could only be obtained by personal service. Constructive notice was well known both to common law and chancery practice, and it is therefore a proceeding "according to the course of the common law." 3 Bl. Comm., 283, 444; 1 Freem., Judgm., 127; Hahn *v.* Kelly, 34 Cal., 417.

Why, on principle, two judgements in the same court of general jurisdiction in due form should be entitled to different presumptions respecting the verity of the record simply because one is against a non-resident where the proceeding is *in rem* is a question the proper solution of which no court has successfully attempted. Mr. Freeman says that "the tendency of modern decisions is to strengthen the position that the orders and proceedings of courts of general jurisdiction where process is constructively served are supported by the same presumptions as when the court proceeds upon per-
92 sonal service, and can no more be avoided for mere errors and irregularities than can its other orders and judgements." 1 Freem., Judgm., 127. See Fanning *v.* Krappfi, 68 Iowa, 244; 26 N. W., 133; Dowell *v.* Lahr, 97 Ind., 146; Quarl *v.* Abbett, 102 Ind., 233; 1 N. E., 476; Williams *v.* Moorehead, 33 Kan., 609; 7 Pac., 266; Williams *v.* Hudson, 93 Mo., 524; 6 S. W., 261; Stewart *v.* Anderson, 70 Tex., 588; 8 S. W., 295; Adams *v.* Cowles, 95 Mo., 501; 8 S. W., 711. "The authorities upon this side of the question have apparently received an unexpected accession from the Supreme Court of the United States. From the language employed by that tribunal

we understand it to be firmly committed to the doctrine that when it appeared that defendant was served with process by publication no jurisdictional presumption could be indulged in in favor of the judgement; but this language is now limited in its application to cases in which it does not appear that the court made any order justifying such publication. * * * On the other hand, if it is shown that the court ordered such service, its judgements are supported by the same presumption as in other cases unless the statute requires that evidence of such jurisdictional fact shall appear by record, and it does not so appear. If it (this decision) means that except as to matters which the statute has expressly required to be a part of the judgement or judgement-roll the court must always presume that jurisdiction was obtained where the record does not rebut such presumption, then this decision is an important aid to the ultimate establishment of the rule that judgements of courts based upon constructive service of process are supported by the same presumptions as if such service were personal." 1 Freem., Judgm., 127; Applegate *v.* Mining Co., 117 U. S., 255; 6 Sup. Ct., 742.

It would seem that the decision in the case of Applegate *v.* Mining Co., *supra* (especially in view of what was said in the case of Sargeant *v.* Bank, 12 How., 371, that no papers could be looked to in order to determine the sufficiency of publication but such as by statute constituted the judgement-roll), clearly announced the rule that the court will presume jurisdiction was obtained over
93 the defendant where the judgement-roll does not rebut that presumption. In Applegate *v.* Mining Co. the statute under which the proceedings resulting in the judgement in question had been conducted authorized the court to appoint a day for the absent defendants to enter their appearance in the suit and required a copy of its order to be published "in the Kentucky Gazette or Herald and continue for two months successively, and shall also be published on some Sunday immediately after devine service in such church or meeting-house as the court shall direct, and another copy shall be posted at the front door of said court-house." In support of the judgement extrinsic evidence was offered of the publication of the order in the Kentucky Gazette in nine successive weekly issues of that paper; but there was no evidence of the publication of the order in church or its posting at the front door of the court-house. The court said: "But the record contained no proof of publication and posting notice, as required by statute, and it is insisted by the defendants in this case that the record itself must show the publication and posting notice as required by law; otherwise the jurisdiction of the court does not appear, and its decree is absolutely void. While it must be conceded that in order to give the court jurisdiction over the person of the defendants all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that evidence that the steps were taken must appear in the record, unless, indeed, the statute expressly or by implication requires it. The court which made a decree in the case of Clark *v.* Conklin was a court of general jurisdiction; therefore every presumption not inconsistent with the record is to be

indulged in in favor of its jurisdiction. * * * It is to be presumed that the court before making this decree took care to see that its orders for constructive service, on which its right to make the decree depended, had been obeyed. That this presumption is authorized will clearly appear by the following cases:

In Harvey *v.* Tyler, 2 Wll., 328, the court stated: 'The juris-
94 diction which is now exercised by the common-law courts in this country is in a very large proportion dependent upon special statutes conferring it. * * * In all cases where the new powers thus conferred are to be brought into action in the usual form of common law or chancery proceedings we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court.' In Hall *v.* Law, *supra*, the validity of the partition in lands made by a circuit court of the State of Indiana was attacked. This court said: 'All that the statute designates as necessary to authorize the court to act is that there should be an application for the partition by one or more adjoining proprietors after giving notice of the intended application in a public newspaper for at least four weeks. When application is made the court must consider whether it is a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given as prescribed. Its order made thereon is an adjudication on these matters.' The case of Voorhees *v.* Bank, 10 Pet., 449, was an action of ejectment, and the case turned on the validity of a sale of the premises in controversy under a judgement of the court of common pleas of Hamilton county, Ohio, in a case of foreign attachment. The sale was attacked on the following, among other, grounds: (1) Because the statute authorizing the proceeding by foreign attachment required that an affidavit should be made and filed by the clerk before the writ issued, and no affidavit was found in the record; (2) because the statute directed three months' notice to be given by publication in a newspaper of the issuing of the attachment before judgement should be entered, and also required 15 days' notice of the sale to be given, neither of which appeared by the record to have been done; (3) because the statute required that the defendant should be put in
95 default at each of the three terms preceding the judgement and the default entered of record, but no entry was made of the default at the last of the three terms. But the court overruled the objections and sustained the validity of the judgement of the sale. It said: 'But the provisions of the law do not prescribe what shall be deemed evidence that such acts have been done or direct that their performance shall appear on the record. * * * This leaves the question open to the application of those general principles of law by which the validity of sales made under judicial process must be tested, in the ascertainment of which we do not think it necessary to examine the record in the attachment for evidence that the acts alleged to have been omitted appear therein to have been done.'" The court announces, as a result of these opinions, that "where a court of general jurisdiction is authorized in a

proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon the property lying within its territorial jurisdiction, but is not required to place proof of service upon the record, and the court orders such substitutive service, it will be presumed, in favor of the jurisdiction, that service was made as ordered, although no evidence thereof appears of record, and the judgement of the court, so far as it affects such property, will be valid." See Grignon *v.* Astor, 2 How., 319; Lessee of Boswell *v.* Sharp, 15 Ohio, 447; Van Fleet, Coll. Attack, 388–396, 834; Essig *v.* Lower (Ind. Sup.), 21 N. E., 1090.

From these authorities it would seem that judgements rendered against non-residents were entitled to the same presumptions as in cases of personal service. The case of Galpin *v.* Page seems to be at variance with the cases just cited and has been substantially overruled, although this is denied by the court in the case of Applegate *v.* Mining Co. The rule announced in the case just cited and in Hahn *v.* Kelley is, we think, for the best interest of the public generally and essential for the security and repose of titles to
96 property as personal rights. Accordingly we are of the opinion (*a*) that the affidavit upon application for order of publication and the order based thereon, under the Compiled Laws of 1876, are not a part of the record, and their existence or non-existence cannot be appealed to in this collateral attack to impeach the verity of the record; (*b*) that, the recital of service of process not being contradicted by anything appearing in the judgement-roll, the presumption is that the court acquired jurisdiction of the defendant, and in this collateral proceeding the decree of divorce there rendered is unassailable and conclusive.

In reaching these conclusions we have in mind the rule that collateral assaults upon judgements are not favored unless it clearly appears that the court had no jurisdiction or transcended the same, and especially when the equities are upon the side of the party attempting to uphold the validity of the decree. Head *v.* Daniels, 38 Kan., 12; 15 Pac., 911; Gemmell *v.* Rice, 13 Minn., 406 (Gil., 371); Ogden *v.* Walters, 12 Kan., 235.

Plaintiff was an actual and *bona fide* resident of the Territory. The marriage between her and Elliot Butterworth, by reason of his non-residence, had ceased to be of any practical effect. The court had authority to determine the status of the plaintiff. It was a proceeding *in rem*. No property rights or children were concerned and no personal judgement was prayed for. Notice to the defendant was not a natural right, but he was entitled to it only by reason of the statute. Borden *v.* State, *supra*. He received notice of the proceedings. If process was irregular or the notice defective, he could have appeared and contested the proceedings. Even if the judgement were erroneous, it is invulnerable in this attack. Pettiford *v.* Zoellner, 45 Mich., 362; 8 N. W., 57; Estate of Newman, 75 Cal., 220; 16 Pac., 887. He was not misled or prejudiced. He regarded the decree as valid and contracted new relations.
97 The plaintiff in good faith married the deceased. Both accepted the decree of the court as valid. Neither one could

question its validity. They had acquiesced in it and had validated it, even if it were invalid. Crosby *v.* Probate Court, 3 Utah, 52; 5 Pac., 552; Pettiford *v.* Zoellner, *supra;* Colton *v.* Rupert, 60 Mich., 329; 27 N. W., 520; Hendrick *v.* Whittemore, 105 Mass., 26; Arthur *v.* Israel, 15 Colo., 147; 25 Pac., 81. After so great a lapse of time and in view of the new relations contracted since, the court ought to indulge in any reasonable presumption that would give validity to the decree and determine that the parties were duly separated and the new relations were not criminal and meretricious. Wilson *v.* Holt, 83 Ala., 540; 3 South., 321; 1 Bish. Mar., Div., and Sep., 77, 956–958, 1148, 1149; Carroll *v.* Carroll, 20 Tex., 741.

Sound reasons of public policy would dictate the upholding of the decree where there have been subsequent marriages, children born, and property acquired, especially when the court had jurisdiction of the subject-matter, and when the only contention is that process was defective, though defendant had actual notice of the proceedings and was not prejudiced in any manner. If neither can question the validity of the decree, if both are estopped, what principle of justice in the case would permit third parties to do so? This case was tried in a court of equity. We cannot see why, when the defendant is not complaining of any wrong done, and when in fact no wrong was done and no fraud perpetrated in procuring the divorce, and he had full knowledge of the proceedings, some third party in a collateral proceeding can question the judgement because of defective process. It is a matter of common knowledge that in many of the proceedings of probate courts in this Territory there have been informalities and, perhaps, serious irregularities, but for years their adjudications have been acted upon and property rights have been acquired. Hundreds of divorces have been granted and new relations have been entered into. If we were to declare
98 this decree invalid, it would bastardize many children, disrupt families, unsettle titles, and bring litigation and trouble to many homes. We think, in addition to the reasons heretofore assigned for upholding this decree, the ones just suggested are entitled to consideration and add strength to the conclusions just reached.

2. To determine who are the heirs of the decedent it becomes necessary to ascertain the ancestor from whom the estate came. Royal D. Amy *et al.* contend that the estate descended from Dustin Amy, father of decedent, while the other parties to this controversy assert that it was originally acquired and owned by the mother of the decedent. On the trial counsel for Adelia Young *et al.* offered the declaratory statement of decedent's mother, dated January 8, 1872, directed to the probate judge of Salt Lake county, by which she claimed to be the owner and occupant of the premises in controversy and petitioned to be adjudged the occupant and owner thereof; also an order of the probate court citing all persons interested in said property to appear, and the order of the court, which it seems was not signed, reciting that "the case duly came on for hearing upon the application of the party, and upon investigation thereof, the evidence adduced, the affidavit herein filed, and the alle-

gations of the parties the court is of the opinion, and it is so ordered and adjudged, that the said Lavira C. Smith (Amy) is the original owner of (then follows the description of the premises in controversy); and it is further ordered that certificate of title issue in accordance therewith." Counsel for Royal D. Amy *et al.* objected to its admission for the reason that it was not signed by the probate judge, and for the further reason that it does not contain a finding on the evidence offered in respect to the claim of decedent's mother for the premises in question, and the record is not complete. Objection was overruled. Thereupon a deed from Daniel H. Wells, mayor of Salt Lake City, to Lavira C. Smith (Amy), dated April 28, 1873, was offered in evidence and re-
99 ceived over the objection of Royal D. Amy *et al.* Counsel for Royal D. Amy *et al.* then offered in evidence what purported to be a copy of a deed dated September 16, 1863, executed by Dustin Amy to his wife, decedent's mother, which contained the clause, "Unto the said Lavira Smith, during her natural life, and after her decease to be and become the property of Oscar A. Smith (the deceased), son of said Lavira Smith, the said property being the same that said Dustin Amy received in trade from Claud Clyde," etc. They also offered the deposition of Royal D. Amy to prove that the deed was delivered to decedent's mother, and they claim that the property was held by Mrs. Amy as trustee for the decedent, and that the property was never owned by her, but descended to decedent from his father. We do not agree with counsel in this position. At the time of the alleged deed executed by Dustin Amy he had no interest in the property which could be charged with a future estate. He could do nothing more than transfer possession by any instrument which he might execute. Buxton *v.* Traver, 130 U. S., 235; 9 Sup. Ct., 509. In the case of Whittemore *v.* Cope (Utah), 40 Pac., 256, it was claimed that because the property was the homestead of the deceased his wife (who continued to reside thereon) could not hold it adversely, and that she held only a life interest therein. The court, speaking of this claim, say: "In 1868 the land laws of the United States were extended over Utah, and the mayor's entry was made in November, 1871. * * * Thomas Cope, deceased, had no estate whatever in said lot, not even an inchoate right. He could not devise it and give title and it would not pass to his heirs. No interest that he possessed could be the foundation upon which to predicate a homestead title, and out of his naked possession no estates in life or remainder could be carved." The case of Drake *v.* Reggel (decided by this court), 37 Pac., 583, we think, is decisive on this question. In that case George Cronyn executed to his daughter a deed of the premises in controversy in 1865, conveying a life estate to her, with remainder in fee to such of her heirs as she might appoint. The court,
100 speaking to the question, say: "At the time of the execution of the Cronyn deed the grantor had no other right or title to the land than a simple possession. The land was public land of the United States, and no statute then provided for its sale. * * * The town-site act under which title was obtained was enacted March

7, 1867, and the act of the territorial legislature prescribing the necessary regulations thereunder was passed February 17, 1869. * * * The second section enacts that within thirty days after the entry of the town site by the corporate authorities they shall give a prescribed public notice thereof. Section 3 prescribes that 'within six months after the first publication of such notice each and every person * * * claiming to be the title owner or possessor, occupant or occupants, or to be entitled to the occupancy or possession of such land * * * shall file a statement in writing with the probate court of the county containing a description of the land claimed and the specific right claimed therein; * * * that all persons failing to make and deliver such statement within the time limited in this section shall be forever barred from the right of claiming or recovering such land or any interest or estate therein or any part, parcel, or share thereof in any court of law or equity.' * * * On March 26, 1872, Lizzie D. Wilson filed with the clerk of the probate court of Salt Lake county her statement describing said premises, but alleges that she is entitled to a life estate in the said piece or parcel of land, remainder to her lawful heirs, and prays that a fee-simple deed may issue to her, and further referring to the Cronyn deed and the book and date of its record as a source of her right. * * * The probate court adjudged Lizzie D. Wilson to be the lawful owner of possession of the said premises and to be entitled to a deed thereof in fee-simple. * * * But it is contended that Lizzie D. Wilson, being, as claimed, entitled to a life interest, stood in the relation of trust towards those entitled in remainder, and that the trustee having by a breach of duty acquired the title, equity will hold her as trustee for the remainder-
101 men, notwithstanding their failure to file the required statement; in other words, that, although the statute attempts to bar any one so failing from thereafter claiming any estate in any court of law or equity, there is one particular estate which such person can still claim in a court of equity. We find nothing in the statute to warrant this conclusion. In referring to a similar statute of the Territory of Colorado the Supreme Court of the United States said: 'No language could be more explicit to make the failure to deliver the statement within the time specified a bar, an absolute bar, to the recovery of the same, however strong might be the equitable claim to the land so lost.' Cofield *v.* McClelland, 16 Wall., 335. * * * In any event the legislature did not see fit to exempt trustees from the benefit of the statute, nor the owners of equitable estates from its bar; and the duty of the court is to declare the law, and not to make it. * * * Appellants, having failed to file the required statement, are precluded from recovering any estate in the premises created by the Cronyn deed and adverse to the fee-simple estate conveyed to Lizzie D. Wilson by the mayor of Salt Lake City." It was the duty of the probate judge to ascertain the question of occupancy, and his adjudication and the deed issued to decedent's mother by the mayor of Salt Lake City are conclusive in this collateral attack. Ming *v.* Foote (Mont.), 23 Pac., 515; Smelting Co. *v.* Kemp, 104 U. S., 647; Rogers *v.* Thompson, 9 Utah, 47; 33 Pac.,

234; Society *v.* Dalles, 107 U. S., 336; 2 Sup. Ct., 672; Baker *v.* Brickell (Cal.), 25 Pac., 492.

Whether or not a trust arose in favor of decedent by the deed from Dustin Amy it is not necessary for us to determine, but, under the authorities above referred to, it is clear the legal title to the premises passed to Lavira Amy by the mayor's deed, and that she is to be regarded as the person who first brought the property into the family. But if it is admitted that Dustin Amy had an equitable interest in the premises, upon the death of Lavira Amy the
102 legal estate descended to her heirs, and where the legal and equitable estate in the same land become vested in the same person the equitable will merge in the legal estate. Whyte *v.* Arthur, 17 N. J. Eq., 523; 1 Perry, Trusts, 347. In the case of Nicholson *v.* Halsey, 1 Johns. Ch., 420, it was held that the equitable estate inherited from one ancestor merged in the legal estate inherited from the other ancestor, and did not open or separate at the death of the heir, and that the course of the descent of the property which had been so inherited is to be determined by legal title. See Patterson *v.* Lamson, 45 Ohio St., 90; 12 N. E., 531; Shepard *v.* Taylor, (R. I.), 3 Atl., 383.

3. Having determined that the land in question was originally owned by the mother of Oscar A. Amy and passed by descent to decedent and Lavira A. Smith, the question then arises who are the heirs of the deceased? The statute of succession provides that if "the decedent leave no issue, the estate goes one-half to the serviving husband or wife, and the other to the decedent's mother and father in equal shares, and if either be dead the whole of said half goes to the other. If there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased person by right of representation. If the decedent leave no issue, nor husband nor wife, the estate must go to his father and mother in equal degrees, or if either be dead then to the other. * * * If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, or sister, the whole estate goes to the surviving husband or wife." 2 Comp. Laws Utah, p. 123. Section 2749 in the same act is as follows: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance."

Appellants, Royal D. Amy *et al.*, claim that the statute has
103 abolished the rule prevailing at common law, viz., that half blood could not inherit, and that, though they are the half brothers and sisters of the deceased, they are heirs to his estate and inherit the entire property, unless Jennie Amy shall be considered his lawful wife, in which event they will be entitled to one-half. It is clear that unless the section last referred to is a modification or limitation of the preceding acts their position is correct. Subdivisions 5, 6, 7, and 8 of section 2741 would indicate that it was the purpose of the legislature to hold the property in the family of the

propositus, and section 2756, which enacts that if no issue be left by the deceased, nor husband nor wife, and the mother be living, the estate goes to the mother, and if the estate came to him as an advancement from his father, and he be living, such estate goes to the father, seems to look to the same result. In answer to section 2749 it is claimed that it can have no application except in cases of next of kin of the half blood and the whole blood in equal degree—that is, if the claimant be within any of the classes expressly preferred, viz., either wife, child, parent, brother, or sister. This simple fact of near relationship to the deceased is by the statute made sufficient without inquiring as to blood or the source from which the estate came. We cannot agree with counsel in the views so learnedly put forth by them nor with the decisions cited by them from 21 Mich., 229 (Ryan *v.* Andrews); 32 Mich., 70 (Rowley *v.* Stray), and 43 Wis., 167 (Kirkendall's Estate). The statute is clear and unambiguous and means precisely what the words import, that kindred of the half blood are excluded from inheriting property that descended from a line in which they are not related. The word "ancestor" as used in this connection is construed to mean the last possessor before the decedent—that is, the person from whom the land immediately descends to the decedent. The propositus of Oscar A. Amy and Lavira A. Smith was their mother, and upon the death of Lavira A. Smith her estate was inherited by the decedent herein.

C.

The estate in question "came by descent to the intestate,"
104 Oscar A. Amy, from his ancestors, Lavira C. Amy and Lavira A. Smith. Gardner *v.* Collins, 2 Pet., 89; Cutter *v.* Waddingham, 22 Mo., 264; Valentine *v.* Wetherill, 31 Barb., 660; West *v.* Williams, 15 Ark., 693; Wheeler *v.* Clutterbuck, 52 N. Y., 70; White *v.* White, 19 Ohio St., 534; note to Prescott *v.* Carr, 61 Am. Dec., 660.

Before Royal D. Amy *et al.* can inherit any portion of the estate of the decedent they must trace their blood to the propositus through whom decedent inherited the property. They cannot connect themselves in this manner with the mother of Oscar A. Amy, from whom he inherited an undivided one-half; neither can they trace their blood to his half-sister, from whom he inherited the remaining half. Perkins *v.* Simonds, 28 Wis., 90; Kelly's Heirs *v.* McGuire, 15 Ark., 588; Den *v.* Searing, 8 N. J. Law, 347; Deadrick *v.* Armour, 10 Humph., 599. The provisions of the statute under which brothers and sisters may inherit are to be construed with reference to the section precluding kindred of the half blood from inheriting estates descending from the ancestor of the decedent. Kelly's Heirs *v.* McGuire, *supra.* In the cases above cited, and particularly Kelly's Heirs *v.* McGuire and Cutter *v.* Waddingham, this question has been so exhaustively discussed and statutes similar to ours construed that we feel it would be a superfluous task to elaborate what we have said. The overwhelming weight of authority is against the views of the Michigan and Wisconsin courts, and we see no reason for departing from the rule so well nigh universal. The statute of succession was passed in 1884, and the legislature had, presumably,

before it the almost unbroken line of authorities sustaining the construction against which appellants contend. To the legislature must be committed the labor of changing the statute, if change is desirable. Under our view of the statute Jennie Amy is the sole heir of her husband.

The judgement of the lower court is reversed and the cause remanded, with directions to enter a decree in favor of the appellant Jennie Amy, awarding her the entire estate of the decedent.

Bartch, J., concurs.

105 In the Matter of the Estate of OSCAR A. AMY, Deceased.

Appeal from the supreme court of the Territory of Utah.

To the clerk of the Supreme Court of the United States:

The appellants, Adelia Young, Cedenia C. Young, and Delecta Maston, by their attorney, Le Grand Young, hereby file a statement of the errors on which said appellants intend to rely, namely: Commencing with the error numbered one, on page 34 of the statement of facts, down to and including error numbered 24, on page 36 of the statement of facts, inclusive—that is, all the errors numbered from 1 to 34 on said pages—and that part of the record on which said appellants intend to rely is the whole of the statement of facts, commencing on page one and ending on page 43 of said statement of facts.

This statement of facts above referred to and which I want printed includes the assignment of errors of appellants.

Also the following part of the transcript which accompanies and is attached to the statement of facts, namely:

The findings of the district court, commencing on page four of the transcript and ending on page six; (2) decree of district court, commencing on page 7 of the transcript, ending on page 8; (3) the opinion of the supreme court of Utah Territory, being the last paper in the transcript, commencing on page 73 thereof.

Please let me know the cost of printing and I will forward draft.

Respectfully, LE GRAND YOUNG.

Received this 22d day of September, 1896, of Le Grand Young, counsel for Adelia Young, Cedenia C. Young, and Delecta Maston, a copy of the above and foregoing statement.

S. P. ARMSTRONG,
Att'y for Jennie Amy.

106 [Endorsed:] Case No. 16,395. Supreme Court U. S., October term, 1897. Term No., 242. Amelia Young *et al.*, app'ts, *vs.* Jennie Amy. Statement of error & designation of the parts of the record considered necessary to be printed by app'ts, & acceptance of service. Filed December 29, 1896.

Endorsed on cover: Case No. 16,395. Utah Territory supreme court. Term No., 242. Adelia Young, Cedenia C. Young, and Delecta Maston, appellants, *vs.* Jennie Amy. Filed October 2nd, 1896.